

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Norfolk Division

SWIMWAYS CORPORATION and  
KELSYUS, LLC,

Plaintiffs,

v.

AQUA-LEISURE INDUSTRIES, INC.,

Defendant.

CIVIL ACTION NO.  
2:16cv260

TRANSCRIPT OF PROCEEDINGS

Norfolk, Virginia

April 4, 2017

BEFORE: THE HONORABLE ROBERT G. DOUMAR  
United States District Judge

APPEARANCES:

WILLIAMS MULLEN, P.C.  
By: Joshua B. Brady  
Craig L. Mytelka  
Michael B. Steele  
Counsel for the Plaintiffs

LeCLAIR RYAN PC  
By: Alan D. Albert  
And  
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY & POPEO, PC  
By: Herbert Joseph Hameline  
Richard H. Maidman  
Counsel for the Defendant

1 (Hearing commenced at 10:01 a.m.)

2 THE CLERK: SwimWays Corporation, et al., versus  
3 Aqua-Leisure Industries, Inc., in civil action 2:16cv260.

4 Are counsel ready to proceed?

5 MR. BRADY: Yes, Your Honor.

6 MR. ALBERT: We are, Your Honor.

7 THE COURT: All right. First, we have 19 claims  
8 that seem to be disputed in this matter, and, accordingly, I  
9 want to get rid of it today if we possibly can. Therefore, I  
10 want to know, my question is, that generally I would allow  
11 each side five minutes to argue any one of the points because  
12 you've already gotten in some excellent memoranda, and we've  
13 gone over it.

14 However, there are several that may need more than  
15 five minutes, so I want the suggestion that you have  
16 concerning those that you feel you need more than five  
17 minutes a side. Just tell me. No more than four. There are  
18 four that I think you may want more than five minutes a side.  
19 I've looked at them, and the four that I thought might merit  
20 10 minutes a side were the apparatus, the back support  
21 member, the extension continuously, and the last one was the  
22 different than the shape.

23 Those four I will allow 10 minutes a side. Any  
24 problems with any of this? If there is any problems, let me  
25 know.

1 MR. BRADY: No, Your Honor, that would be fine for  
2 plaintiffs.

3 MR. ALBERT: Your Honor, I've not had a chance to  
4 introduce my co-counsel. I don't believe they have appeared  
5 in front of you before. Joe Hameline and Rich Maidman from  
6 the Mintz Levin firm in Boston.

7 THE COURT: Mr. Hameline?

8 MR. HAMELINE: Yes, Your Honor.

9 THE COURT: I just want to make sure.

10 And Mr. Maidman?

11 MR. MAIDMAN: Yes, sir.

12 THE COURT: You must have had a lot of kidding going  
13 to school.

14 MR. ALBERT: Fortunately, he was tall, Your Honor.

15 THE COURT: Nobody would mess with him, that's for  
16 sure, Mr. Albert.

17 MR. ALBERT: I think Mr. Hameline was going to  
18 respond, if the Court doesn't mind.

19 THE COURT: All right. Who is going to be arguing  
20 most of these matters for SwimWays?

21 MR. BRADY: Your Honor, that would be me, Joshua  
22 Brady, from Williams Mullen.

23 MR. ALBERT: On our side, Your Honor, we would  
24 propose, with the Court's leave, Mr. Hameline would argue two  
25 of the patents and Mr. Maidman the third.

1           THE COURT: Perfectly all right with me. I want to  
2 make it clear that two people don't argue the same point.  
3 Just so either side, two people do not argue the same point.

4           Okay. My law clerk is prepared to take time. I  
5 think we will go, half of you will start with the plaintiff  
6 and half of you will start with the defendant, and there will  
7 be no rebuttals because we just don't have time, okay.

8           So what we'll do is we'll start with the plaintiffs  
9 SwimWays at first and go through them just as you went  
10 through them. We'll start with the first one on your charts,  
11 which you originally submitted, and we'll go right down the  
12 chart, if we can do that. That is, we start with the first  
13 one that I believe was "seated position."

14          MR. ALBERT: Your Honor, while Mr. Brady is getting  
15 set up, I might mention to the Court, we actually have at  
16 least one of these floats here, and are prepared to bring it  
17 out at the appropriate time. I just wanted to mention that  
18 to the Court. That's why the box and the pump are sitting in  
19 the chair.

20          THE COURT: All right.

21          MR. ALBERT: We will see how our time is going and  
22 see where the Court is.

23          THE COURT: I've also got to advise you that quarter  
24 to 12:00 I'm going to stop and come back at quarter after  
25 2:00, and we will quit at quarter to 5:00 no matter where we

1 are, okay.

2 MR. ALBERT: Thank you so much, Your Honor.

3 THE COURT: We can't pay overtime here, if you  
4 really want to know the truth. We can't.

5 MR. BRADY: Your Honor, you wanted to begin with  
6 "seated position"; is that correct?

7 THE COURT: "Seated position," as I recall the first  
8 one on the combined chart; isn't that correct?

9 MR. BRADY: Yes, Your Honor, I believe that is  
10 accurate. So the term "seated position" appears in claims of  
11 the '540 and the '640 patents. These are related. They  
12 share a common specification. An example of limitation is  
13 the apparatus being configured to support a user in a seated  
14 position.

15 Now, this term was considered previously by the  
16 Eastern District of Virginia.

17 THE COURT: By Judge Gibney. I'm familiar with it.  
18 You can assume that I have read the memoranda, okay. Just  
19 assume that, but don't assume that I understood it, just  
20 understood that I read it. Okay. In fact, I read it twice,  
21 so we will see where we go from there, okay.

22 MR. BRADY: Understood. Plaintiffs take the  
23 position that Judge Gibney got it right, that construing the  
24 term "seated position" as an upright seated position and a  
25 reclined seated position, but not a prone position, is

1 accurate, that that accurately reflects the scope of the  
2 invention disclosed in the specification. For clarification  
3 we've also inserted the word "supine," which I believe means  
4 laying face up as opposed to prone which sometimes means  
5 laying face down. But the point is the Court previously  
6 interpreted the claim correctly to distinguish between seated  
7 and reclined positions versus a prone or laying flat  
8 position.

9           Aqua-Leisure proposes to construe it as a position  
10 with the torso erect. Not entirely sure what that means  
11 because neither of those terms appear in the specification.  
12 I don't know if erect means a 90-degree angle relative to the  
13 hip or anything less. It would appear from the arguments  
14 that Aqua-Leisure's trying to use figure 4A to support its  
15 proposed construction. The problem there is figure 4A is  
16 just one of many disclosed embodiments.

17           If the Court were to adopt Aqua-Leisure's proposal,  
18 I think we run the risk of excluding numerous embodiments  
19 disclosed in the specification. The Federal Circuit is very  
20 clear that doing so requires a significant evidentiary  
21 burden. So the specification teaches that each of the  
22 disclosed embodiments are designed to support a user in a  
23 seated position while floating on water.

24           So with that scope, one of ordinary skill would  
25 understand that subsequent statements also relate to that

1 seated position phrase. For example, the '540 patent teaches  
2 that figure 1 can support a user in an upright seated  
3 position and also in a reclined position between an uprighted  
4 seated position or a prone position. So that's a wide range  
5 of reclining positions. And there's several instances in the  
6 specification that relate to that, that a user can recline  
7 and still have his or her back supported on an embodiment.

8 I think it's helpful to keep in mind why this  
9 limitation is present. So the background of the  
10 specification identifies another patent to an inventor named  
11 Arias, and that patent relates to a flat float where the user  
12 can be prone, laying all the way flat down. In fact, the  
13 specification describes that patent as used by a person in a  
14 laying or prone position.

15 And then to distinguish that, the '540 patent and  
16 the '640 patent teach upright positions. In fact, one of the  
17 advantages is that the configuration would be desirable for  
18 many activities in which a laying or prone position is less  
19 advantageous.

20 So in view of the range of seated positions that a  
21 user may have in the disclosed embodiments, I think Judge  
22 Gibney had it right. Adopting Aqua-Leisure's narrow  
23 construction of a torso erect, which I'm not sure entirely  
24 what that means, runs the risk of excluding anything less  
25 than a fully erect torso. So we ask the Court to adopt the

1 prior construction by Judge Gibney.

2 THE COURT: Thank you, Mr. Brady.

3 All right. Is Mr. Hameline?

4 MR. HAMELINE: Mr. Hameline, Your Honor. Your  
5 Honor, we have so many of these back and forth, I have a hard  
6 copy of my presentation, and rather than going back and forth  
7 with the computers, if I hand up the hard copy, we won't have  
8 to do that. I think it will be more efficient.

9 THE COURT: Well, I'm all in favor of more  
10 efficiency.

11 MR. ALBERT: One for the law clerk and one for the  
12 Court. I've got a third if there is anyone else who wants  
13 one. We provided it to opposing counsel, Your Honor.

14 THE COURT: It's very attractive pictures in here.

15 MR. HAMELINE: Thank you, Your Honor. None of them  
16 are of me, that's for certain. So we have a fairly hefty  
17 package here, Your Honor. I don't think I'll use a quarter  
18 of the references in this. It's really just for context, et  
19 cetera. And in terms of context, if you look at Page 3 and  
20 4, just to give a focus to what we are talking about, these  
21 are the, quote, accused devices, and you'll see that there  
22 are a range of pool floats in various configurations. And  
23 those are the accused devices, just to give some context and  
24 perspective.

25 Seated position begins on Page 17. We have, just



1 for ease of reference in putting in one place, and also  
2 because I have trouble reading some of the patents, and the  
3 languages or the font is so small, we have reproduced some of  
4 the claims in here just so they are all in one place.

5 The context for these claims is that it is  
6 referencing a seated position collectively configured to  
7 support a user in a seated position and being configured to  
8 support a user in a seated position. So it's all about what  
9 is the configuration of the apparatus or the device that  
10 allows someone to be in a seated position.

11 I would say initially there is no disclosure in the  
12 patent, and there is nothing in the claims that gives us an  
13 understanding of how the device is supposed to be  
14 collectively figured or is configured to support the user in  
15 a seated position.

16 So it's indefinite at best in that context. But to  
17 focus in particularly just on the term "seated position," if  
18 you turn to Page 20, which is where the figure 4A that  
19 Mr. Brady referred to, that's the reference in the '640  
20 patent, and the reason why the prior claim construction  
21 doesn't apply here, one of the reasons, is because the '640  
22 patent issued in 2014. The '540 and the '640 have the same  
23 specification except for this one figure, and they all come  
24 out of the same prior patent application filed years ago.

25 The '640 patent issued in 2014, the prior claim

1 construction was in 2013. So this figure was not in front of  
2 the judge in that prior claim construction. What this figure  
3 shows, it is the only embodiment, it is the only figure, it  
4 is the only description in the patent which shows how a user  
5 sits in the apparatus in a seated position. And you'll note  
6 it is in an upright seated position, clearly delineates the  
7 difference between that, and if you look at some of the  
8 accused devices, we are looking at where somebody lies flat  
9 with their head just tilted up on a pillow, et cetera, or  
10 essentially in that configuration.

11 THE COURT: Who argued the case before Judge Gibney?

12 MR. HAMELINE: So two different lawyers, Mr. Pierce  
13 on behalf of Aqua-Leisure and Mr. Poynter on behalf of  
14 SwimWays. They have gone their separate ways, and we are  
15 here today.

16 THE COURT: All right. I have a little problem.  
17 Here we have a judge in this district with the same parties  
18 ruling in a particular manner, and what you're saying is you  
19 want to overrule that judge; correct?

20 MR. HAMELINE: I'm not sure that overrule is the  
21 right word. I understand your position.

22 THE COURT: I'm certainly not going to overrule  
23 Gibney, but I may not agree with him necessarily.

24 MR. HAMELINE: Yes.

25 THE COURT: However, the question really is, you're

1 saying, well, he didn't make a proper argument in the case  
2 before Gibney.

3 MR. HAMELINE: No, no, I'm not saying that, Your  
4 Honor. I'm saying that this issue was not available to argue  
5 in 2013 because this patent didn't issue until 2014. This is  
6 the seated position, figure 4A. It was not available to be  
7 before the Court. So it could not have been considered --

8 THE COURT: So what you're saying is this changes  
9 everything?

10 MR. HAMELINE: It does, Your Honor, absolutely. And  
11 I would also comment, in connection with the reclined  
12 position, when they say they're not sure what "seated  
13 position" means, I would just turn the tables on that and say  
14 this reclined position, this range of reclined positions.

15 THE COURT: Certainly, it can't be a prone position.  
16 You agree with that?

17 MR. HAMELINE: I agree with that, and it's not  
18 standing up.

19 THE COURT: What they are doing is differentiating  
20 between a prone position and their position, is what they are  
21 doing, and you're saying it's got to be a greater difference  
22 than just not a prone position?

23 MR. HAMELINE: Exactly.

24 THE COURT: Because prone position is in another  
25 patent or a past patent; correct?

1 MR. HAMELINE: It's in a completely separate family  
2 of patents, has nothing to do with this.

3 THE COURT: Right. I understand that. You  
4 understand it. So you're saying distinguishing it is such  
5 that the only way to distinguish it is to have a fully seated  
6 position, which is upright?

7 MR. HAMELINE: Correct, Your Honor.

8 THE COURT: And so a recliner just doesn't fit the  
9 bill, as far as you're concerned?

10 MR. HAMELINE: Correct, Your Honor.

11 THE COURT: If the person isn't sitting upright,  
12 then it's terrible; correct?

13 MR. HAMELINE: Correct. It does not fit.

14 THE COURT: That's a little tough; isn't it?

15 MR. HAMELINE: Well, I would say, Your Honor, for  
16 the purposes of a patent where you're getting a 17-year  
17 monopoly on providing something to the market, you've got to  
18 clearly and objectively distinguish what your invention is  
19 and what is not claimed in the patent. And when you talk  
20 about ranges of reclined position, it doesn't send a message  
21 to the market, it doesn't send a message to a person of  
22 ordinary skill in the art as to what is distinguished and  
23 what is claimed.

24 When they talk about a range of reclined positions,  
25 that doesn't tell us anything. It is from flat with a head

1 tilted to, you know, almost upright seated. I don't know  
2 where that line is drawn. No one out there in the market  
3 knows where the line is drawn; and, therefore, we have to  
4 draw the line somewhere to appraise the market, to appraise  
5 people who are trying to either abide by the patent, or  
6 license the patent or whatever, what is the line that is  
7 drawn. Where is it drawn?

8 THE COURT: I understand your position is as long as  
9 the back of this is not on a 90-degree angle, you can copy it  
10 all day long and Sunday; isn't that correct?

11 MR. HAMELINE: That is not correct, Your Honor.

12 THE COURT: If that isn't your position, then you've  
13 got a position where, what, is it 89-degree angle, 79-degree  
14 angle?

15 MR. HAMELINE: It's that position, Your Honor,  
16 figure 4A. (Indicating).

17 THE COURT: Always this position?

18 MR. HAMELINE: No, Your Honor.

19 THE COURT: Only this position that you can have?

20 MR. HAMELINE: Well, it is this general position.

21 THE COURT: And this isn't a 90-degree angle,  
22 though.

23 MR. HAMELINE: It's pretty close. It is.

24 THE COURT: It's close?

25 MR. HAMELINE: As we say in our description.

1 THE COURT: It's close?

2 MR. HAMELINE: As we say in our description, it's an  
3 upright position as opposed to what they say is it anywhere  
4 from 1 degree to 90 degrees. If you're looking at what is an  
5 objectively reasonable limitation and explanation, we give  
6 you one. They give you nothing. That's the simple fact.

7 THE COURT: You just said it's not prone.

8 MR. HAMELINE: I'm sorry.

9 THE COURT: They claim that it's not a prone  
10 position.

11 MR. HAMELINE: But that's not a seated position.  
12 There is a reclined position they talk about. They talk  
13 about various levels of reclined position in the  
14 specification. That's not seated.

15 THE COURT: It's an interesting argument that you  
16 will take a picture and say everything that's not in the  
17 picture is open; correct?

18 MR. HAMELINE: No, what I'm saying is --

19 THE COURT: And the picture isn't a 90-degree angle,  
20 that worries me.

21 MR. HAMELINE: What I'm saying, Your Honor, is the  
22 description we give of the torso upright is what is  
23 referenced in figure 4A. What they are saying is it's  
24 anything from almost flat to 90 degrees. So we are trying to  
25 give some objective, reasonable limitation. They are saying

1 it's anything.

2 THE COURT: So I thought you were saying it had to  
3 be absolutely at a 90-degree angle?

4 MR. HAMELINE: Sufficient with the torso erect.

5 THE COURT: In this picture you could do it;  
6 correct? It's not 90 degrees.

7 MR. HAMELINE: That picture is the representation of  
8 seated position, correct, Your Honor.

9 THE COURT: So you're saying that under this  
10 anything -- I don't understand what you're saying. How many  
11 degrees is that? That's measurable. How many degrees is it  
12 in this picture? You give me your estimate.

13 MR. HAMELINE: I'd say 80 degrees.

14 THE COURT: So 80 degrees is perfectly all right?

15 MR. HAMELINE: It's a position with the torso erect.  
16 The difference, Your Honor, and this is important for patent  
17 purposes, is they give us nothing.

18 THE COURT: The torso is erect. What part of the  
19 torso has to be erect?

20 MR. HAMELINE: From the buttocks up has to be erect.

21 THE COURT: All of it has to be erect?

22 MR. HAMELINE: Generally erect, yes, not aligned or  
23 prone position. The difference, Your Honor, is we are giving  
24 you something. They are giving you nothing. And we are  
25 trying to give you what the patent law requires is an

1 objectively reasonable, distinctive understanding of the  
2 term. They give you nothing.

3 THE COURT: They are allowed to do exactly what's  
4 shown in the picture because that's not an absolute upright  
5 position; correct?

6 MR. HAMELINE: No, the torso is erect.

7 THE COURT: As opposed to upright, because parts of  
8 the body of the back are up. So you're saying it has to be  
9 just like this? It can't be anything else?

10 MR. HAMELINE: We are saying that this gives you an  
11 objective understanding of what a torso erect in a seated  
12 position is. They give you nothing. That's a huge  
13 distinction.

14 THE COURT: You have an uphill battle on this one.

15 MR. HAMELINE: Your Honor, it's patent law.

16 THE COURT: I'm not going to make an absolute ruling  
17 now, but let me look at all of this material and what you've  
18 just handed me, which I have not read yet. I'll read it and  
19 see if I can come to some conclusion that says an upright  
20 position is not 90 degrees.

21 Excuse me. I want to take a little recess.

22 (Recess from 10:24 a.m. to 10:26 a.m.)

23 THE COURT: The law clerk got a little ill.

24 I'm familiar with your position. Your time is up,  
25 five minutes. I gave you a lot more.



1 MR. HAMELINE: You did, Your Honor, and I enjoyed  
2 the colloquy and the discussion. I was just going to point  
3 to Page 3, which are the accused products.

4 THE COURT: You can point to anything when your time  
5 is up, Mr. Hameline. Okay.

6 Next one.

7 MR. BRADY: I believe it is "foot support" and "foot  
8 support member."

9 THE COURT: "Foot support" or "foot support member"?

10 MR. BRADY: Yes, sir. And plaintiffs address this  
11 on slide 10 of our presentation. I'm not going to hook up  
12 the laptop. I don't think we need it. This term, like many  
13 others, is -- defendants introduce a separate from theme.  
14 They want specifically recited members or portions to be  
15 separate from other portions of the apparatus.

16 Judge Gibney already ruled on this, the specific  
17 term, and ruled that a foot support or foot support members,  
18 a member that supports a user's feet but not necessarily  
19 different or separate from the buoyant member. Now, that's  
20 consistent with the specification. There is a lot of  
21 teachings that describe how foot support member can be  
22 inflated with the same bladder that inflates the rest of the  
23 apparatus.

24 So when I read broad teachings like that, in my mind  
25 I think that one embodiment could be a continuous integral

1 piece with a single bladder that inflate and it provides back  
2 support and it provides a foot support. That is consistent  
3 with the scope of the disclosure. That is consistent with  
4 Judge Gibney's prior ruling, and that is what the Court  
5 should adopt here.

6 Now, defendants take it a few steps further. Not  
7 only do they request this element to be separate from the  
8 buoyant member, they say that it should be attached to the  
9 flotation device via a panel, a rod, a tether, or the spring.  
10 Now, those elements certainly do not appear in the claim  
11 language itself, and they are imported limitations from the  
12 specification.

13 But that would be inconsistent with not only the  
14 specification itself but also some claims. For example, the  
15 '640 patent, claim 5, says that the inflatable member  
16 includes a foot support member. So right there is an example  
17 of a claim specifically saying that it can be an integral  
18 component.

19 Under Aqua-Leisure's proposed construction I'm just  
20 not sure really what "separate from" means, but I would  
21 certainly be concerned about how its application would  
22 exclude these integral embodiments. And the separate from  
23 theme is something that is going to come up a number of times  
24 later on, but I think that given the breadth of disclosure  
25 relating to these components, and how they can be commonly

1 inflated, and they can be integral with other components.

2 Aqua-Leisure's first construction just does not  
3 remain consistent with the teachings, so we would ask the  
4 Court to adopt Judge Gibney's construction. Thank you.

5 THE COURT: All right. Let me hear.

6 MR. HAMELINE: Thank you, Your Honor.

7 THE COURT: All right, Mr. Hameline.

8 MR. HAMELINE: Your Honor, I would refer to Page 8  
9 of the PowerPoint because this is a good point that comes up  
10 again, as Mr. Brady correctly says.

11 THE COURT: Slow down. Let me get to it.

12 MR. HAMELINE: Page 8. It comes up in the context  
13 of foot support member, buoyant member, support member, back  
14 support member. And in the specification the plaintiffs  
15 read, and the inventors disclosed, that the invention  
16 includes, "the outer portion of the panel can include one or  
17 more buoyant members (e.g., an inflatable bladder), one or  
18 more support members (e.g., a spring, rigid support member,  
19 or semi-rigid member), one or more foot support members, one  
20 or more back support members," and so forth. That's in the  
21 '540 patent at column 3, lines 33 to 38, just for the record.

22 Their proposals -- I'm sorry, plaintiffs' proposals  
23 are basically the foot support member is a member that  
24 supports the user's feet. The back support member need not  
25 be a separate part and need not be in addition to or

1 something over and above the buoyant member, that is, the  
2 inner tube that goes around. The support member may or not  
3 by the same inflatable bladder as the buoyant member, and the  
4 buoyant member provides buoyancy. In other words, if you  
5 look back on Page 7, what they have defined is nothing. They  
6 have correctly used all of the holdings from various cases  
7 from the Federal Circuit on claim construction for saying  
8 what it doesn't mean, but they haven't told us what it means.  
9 Here is the problem with the broader issue of foot support,  
10 back support, et cetera, is that it hasn't been defined to  
11 mean anything.

12 That's the problem here. You have an inner tube,  
13 basically, is what they have defined. The foot support  
14 member is anyplace you put your feet. The back support  
15 member is anyplace you put the back. The support member is  
16 anything that provides support. The buoyant member first  
17 portion is anyplace you point to, and the second portion is  
18 another place you point to in the same apparatus.

19 So what they have done is defined a way or attempted  
20 to construe or define a way any meaning for these things. So  
21 a foot support just provides support for the foot. A back  
22 support -- this is very important -- isn't anything in  
23 addition or different or separate from the buoyant inner  
24 tube. It just is where you put your back. If you look at  
25 the disclosures in the patent, you see that the back support

1 is something that is in addition to and above, and in the --  
2 actually in the abstract, it initially talks about -- in the  
3 first couple of sentences -- how the back support is in  
4 addition to the buoyant member, and the foot support, which I  
5 just referenced and just read --

6 THE COURT: The foot support can't be buoyant, then,  
7 is what you're saying?

8 MR. HAMELINE: The foot support can be buoyant but  
9 it has to be --

10 THE COURT: Separate buoyancy, is what you're  
11 saying?

12 MR. HAMELINE: It has to somehow be separate and  
13 apart from the inner tube, yes, and that's what the figures  
14 show in the patent.

15 THE COURT: Well, the figures in the patent, have  
16 you got those in here?

17 MR. HAMELINE: Sure. We've got a bunch of those.

18 THE COURT: What page is that?

19 MR. HAMELINE: Let me find those quickly. You look  
20 on Page 24 where we are talking about foot support.

21 THE COURT: Go slow. Realize I have to get to the  
22 thing.

23 MR. HAMELINE: I realize, Your Honor. I apologize  
24 for the number of pages here.

25 THE COURT: Don't apologize.

1 MR. HAMELINE: So if you look at figure 24 you see  
2 that the -- what is called the foot support, which is 10 --  
3 112, it is separate from the buoyant member, the support  
4 member, and the back support member. And that's what we are  
5 trying to articulate here in connection with our  
6 construction. Your Honor, if I might make a second broader  
7 point.

8 THE COURT: Explain something to me here.

9 MR. HAMELINE: Yes, Your Honor.

10 THE COURT: On Page 24 it says, "Figure 1, ('540  
11 patent sheet 1, '640 patent)." Now, which figure 1 is this  
12 figure taken from?

13 MR. HAMELINE: They are identical. The '540 patent  
14 and the '640 patent are identical.

15 THE COURT: All I'm asking, they are both patents;  
16 correct?

17 MR. HAMELINE: Correct. The only difference between  
18 the two is that seated position figure that we saw a moment  
19 ago.

20 THE COURT: The only difference between the two is  
21 what?

22 MR. HAMELINE: The '540 patent and the '640 patent,  
23 the specifications and the figures are identical. The only  
24 difference is in the '640 patent that seated position figure  
25 was added.

1 THE COURT: What do you mean was added?

2 MR. HAMELINE: In the prosecution, the '640 came  
3 later.

4 THE COURT: Oh, I see.

5 MR. HAMELINE: They stuck that in to show what a  
6 user in a seated position is. Your Honor, I have probably  
7 taken up my five minutes, if you have any questions,  
8 otherwise I rely on the brief and the charts.

9 Your Honor, I would also reference figure 4 in the  
10 patent, if that's what you were looking through. That has  
11 the side view of the foot support.

12 THE COURT: I'm merely looking through figures  
13 showing in the patent.

14 MR. HAMELINE: Yes.

15 THE COURT: Obviously, it's interesting.

16 MR. HAMELINE: Most of those are top down views,  
17 Your Honor. Figure 4 is a side view. There are a couple of  
18 other side views.

19 THE COURT: All right.

20 MR. HAMELINE: Should I cede to Mr. Brady? Should  
21 Mr. Brady come up? Are you done with questions for me, Your  
22 Honor?

23 THE COURT: Your five minutes are up.

24 MR. HAMELINE: It's well overdue. Thank you.

25 MR. BRADY: Your Honor, I believe the next term on

1 the list is "apparatus," which may be a 10-minute term.

2 THE COURT: 10 minutes on apparatus.

3 MR. BRADY: I'm not sure plaintiffs will need all 10  
4 minutes.

5 THE COURT: What I can do is I'll allow you five  
6 minutes and five minutes.

7 MR. BRADY: I will accept that, Your Honor. I  
8 appreciate that.

9 THE COURT: Mr. Hameline, on this one, I'm going to  
10 allow you to reply to him, then he is going to reply, and  
11 I'll allow you to re-reply, that is, split your five minutes  
12 on apparatus. Okay.

13 MR. HAMELINE: Thank you, Your Honor.

14 MR. BRADY: This is a semi-failed attempt by  
15 defendants to read in a limitation into every asserted claim,  
16 that limitation being a coilable spring. Now, that issue was  
17 raised in the context of another claim term in the prior  
18 litigation. That term was "panel" in the '540 patent, and  
19 Judge Gibney correctly found that the plain language of the  
20 asserted claims does not require a spring.

21 So these specifications are relatively long, and  
22 they describe numerous structural components. The applicant  
23 for these patents chose to focus some of the claims on  
24 structure other than the spring. In fact, out of 58 claims  
25 in these patents, 38 of them do not recite a spring, but



1 others do. Some independent claims recite a spring or a  
2 shape-retaining member, and some dependent claims add that  
3 spring to the independent claim. So what that means is the  
4 applicant clearly intended not to include a spring in the  
5 asserted claims.

6 Aqua-Leisure, nonetheless, wants to read that in.  
7 So in this situation we have the presumption of claim  
8 differentiation, which means that a claim limitation and a  
9 dependent claim is presumed to not be present in the  
10 independent claim. And that's a very strong presumption in  
11 this case.

12 For example, there are a number of claims that  
13 recite spring. They are dependent narrowing the broader  
14 claims. I don't think I need to list them all. We have  
15 addressed that in our briefing. The Federal Circuit has  
16 addressed similar situations. I think we cited to the  
17 *ScriptPro* case. In that case the specification described --  
18 it's some sort of a collating machine -- I forget the  
19 particulars -- and the defendant and the accused infringer  
20 wanted to read a sensor into every single independent claim  
21 because the described embodiments described a sensor.

22 The Federal Circuit said, no, the specification  
23 could teach one of ordinary skill that other components of a  
24 described can be claimed. In fact, that's not uncommon.  
25 Claims do not have to have every component of a disclosed

1 embodiment. And nothing in the prosecution history for the  
2 asserted patents requires a claim either. So at the end of  
3 the day, this is another attempt by the defendant to read a  
4 limitation into the claims that's improper, and we'd ask the  
5 Court to agree with Judge Gibney and rule that apparatus --  
6 well, I should say that he construed the panel, so there is  
7 that distinction. But panel or apparatus, neither of them  
8 require a spring for these claims.

9 THE COURT: Thank you, Mr. Brady.

10 Mr. Hameline.

11 MR. HAMELINE: Thank you, Your Honor.

12 THE COURT: You want to take 10 minutes or do you  
13 want to take five?

14 MR. HAMELINE: I'll take five. I don't think -- I  
15 think the briefs are actually pretty good on this back and  
16 forth on these points. I turn to Page 14 of our package  
17 presentation. In the abstract on the right, that's the  
18 abstract from the '540 and '640 patents. First line says, "A  
19 collapsible flotation device is provided that used a coilable  
20 spring coupled to a panel," et cetera, et cetera. This is  
21 the essence -- this is the invention. It is recited with  
22 respect to every embodiment that is provided in the patent,  
23 it is disclosed in every figure in the patent, and it is  
24 referenced on basically every line in the patent.

25 And what they want to say now is, oh, no, we didn't

1 mean that a collapsible flotation device is provided that  
2 uses a coilable spring. They want to say that ten years  
3 after they filed these initial patent applications somehow,  
4 oh, no, the spring, that's just not part of this. And so it  
5 is very clear, and we have references on the left here from  
6 the '540 and '640 patents talking about the various  
7 collapsible flotation devices of the invention. That is the  
8 invention.

9 Also refers to a collapsible device that provides a  
10 panel with inner portion and outer portion and a spring. So  
11 throughout this patent it is inherent, it is explicit, it is  
12 clearly stated that the invention is a flotation device with  
13 a spring. In the '888 patent, which we really haven't  
14 mentioned yet, but the spring is also in the '888 patent.

15 THE COURT: Which one of the asserted claims refers  
16 to a spring? Can you point one out to me?

17 MR. HAMELINE: I couldn't. There is a dependent  
18 claim somewhere deep in the bowels of one of these that  
19 references a spring directly.

20 THE COURT: I couldn't find one and that is what  
21 made my curiosity raised.

22 MR. HAMELINE: I'm sure Mr. Brady can point one out  
23 to you, and I would say that it is inherent in all of the  
24 claims, particularly the independent claims --

25 THE COURT: Only because it's in this thing at 57;

1 correct? 1:57-60?

2 MR. HAMELINE: '540 patent at column 1, lines 57 to  
3 60, that's where it says spring. These are simply examples  
4 of where it's found, and I tried to present in particular the  
5 abstract, which is the general description of the invention,  
6 and it says the invention is a flotation device with a  
7 spring. And that's what we talked about --

8 THE COURT: Although none of the claims contain the  
9 word "spring"?

10 MR. HAMELINE: Correct.

11 THE COURT: Because the abstract says spring.

12 MR. HAMELINE: Correct.

13 THE COURT: It means that the claims necessarily  
14 include spring because it's in the abstract; isn't that your  
15 position?

16 MR. HAMELINE: It's not just in the abstract.

17 THE COURT: No, I understand.

18 MR. HAMELINE: It's everywhere in the patent.

19 THE COURT: Isn't that interesting.

20 MR. HAMELINE: So in the '888 patent, Your Honor,  
21 which we haven't really gotten to yet, I think a spring is  
22 referenced in every sentence in the '888 patent. So it is  
23 clearly part of -- it is the invention. That's what the  
24 patent says.

25 THE COURT: So what you're saying is without the

1 spring, there is no support for this patent?

2 MR. HAMELINE: That's essentially what we are  
3 saying, Your Honor. There's patentees behind all that.  
4 That's what we are saying.

5 THE COURT: The spring becomes most important in  
6 this case.

7 MR. HAMELINE: The spring is -- if you look at the  
8 spec, it is the case.

9 THE COURT: So the whole case really falls on the  
10 spring almost; correct?

11 MR. HAMELINE: Well, if the patent is about a  
12 spring, which we say it is, our products don't have a spring.  
13 There are other issues, but that's it.

14 THE COURT: So you can copy all of it except,  
15 because you don't have a spring, you are in great shape;  
16 correct? That's your position?

17 MR. HAMELINE: I wouldn't say we can copy everything  
18 else.

19 THE COURT: Doesn't make any difference whether it  
20 is reclining or erect or whatever it is.

21 MR. HAMELINE: I would say that the invention is the  
22 flotation device with the spring. We don't have a spring,  
23 and so we don't infringe. There are many other reasons we  
24 don't infringe.

25 THE COURT: Well, I know that you've got many other

1 reasons, but this is one of the most important.

2 MR. HAMELINE: Correct, Your Honor. This is the  
3 distinguishing factor in the market, in the patent,  
4 everything else, yes.

5 THE COURT: Okay. Let me hear from Mr. Brady five  
6 minutes, and then you can come back, Mr. Hameline.

7 All right, Mr. Brady. You got five minutes. This  
8 is pretty important, so let's hear what you have to say.

9 MR. BRADY: Yes, sir.

10 THE COURT: I don't know that it's in any of the  
11 claims, but it is in this abstract thing; correct?

12 MR. BRADY: We are not denying that the presence of  
13 a spring is in the specification. There is clearly  
14 advantages to including it. But the '640 and the '540 teach  
15 that there are various embodiments and a number of features  
16 that you can include should that be desired. If we turn to  
17 plaintiffs' slide 6, I have listed claims that recite a  
18 spring or a shape-retaining member.

19 THE COURT: Plaintiffs' slide.

20 MR. BRADY: Number 6, yes, Your Honor.

21 THE COURT: All right.

22 MR. BRADY: These are claims that recite the -- they  
23 add the limitation of a shape retaining member, which can be  
24 a spring, coilable spring to the independent claims. I  
25 believe the '888 patent actually uses the term "spring";

1       whereas, the '540 and '640 patents use the phrase  
2       "shape-retaining member." So in view of those further  
3       limitations in the dependent claims, the doctrine of claim  
4       presumption states that the broader independent claim should  
5       not be limited as such.

6               Now, the plain language of the claim does not recite  
7       a spring or a shape-retaining member, and that's what Judge  
8       Gibney ruled about with respect to the term "panel" in the  
9       '540 patent. In this case the examiner agreed and allowed  
10      claims that did not -- were not limited to a spring, and the  
11      Richmond division also agreed.

12             THE COURT: Did you indicate were not limited to a  
13      spring?

14             MR. BRADY: At least the asserted claims in this  
15      action. I don't have that list handy in front of me.

16             THE COURT: Can you have this list?

17             MR. BRADY: Yes. These are claims that, and I  
18      believe the briefing also provides a list, claims that recite  
19      an element such as a spring or a shape-retaining member. So  
20      reading that spring into these broadest claims, our  
21      independent claim that's asserted, would be importing  
22      limitation from the specification. The Federal Circuit has  
23      repeatedly warned against doing so. We cited case law that  
24      is directly on point with that issue.

25             THE COURT: What case is that that you say you

1 cited?

2 MR. BRADY: A number. I think we start with *SciMed*,  
3 for example, Federal Circuit case that describes importing  
4 limitation.

5 THE COURT: Slow down. You said it is a Federal  
6 Circuit case?

7 MR. BRADY: Yes.

8 THE COURT: That you rely on?

9 MR. BRADY: I would have cited that numerous times  
10 in the brief.

11 THE COURT: Which case is that?

12 MR. BRADY: The first party is *SciMed Life Systems*  
13 *v. Advanced Cardiovascular Systems*. I can provide the  
14 citation.

15 THE COURT: And the citation?

16 MR. BRADY: It is 242 F.3d 1337.

17 THE COURT: Wait a minute. 242 F.3d 1337?

18 MR. BRADY: Yes, Your Honor, that's correct. And at  
19 Page 1340 it describes the cardinal sin of patent law reading  
20 a limitation from the written description into the claims.  
21 And that's the issue that Aqua-Leisure's inviting the Court  
22 to do here, is read the spring into these claims.

23 If there is other 112 issues, which I'm sure that  
24 they are advancing in their invalidity contentions, we will  
25 address those issues at that time if there is lack of written



1 description or enablement problems, things like that. But  
2 for claim construction, the issue is whether the term  
3 "apparatus" should be interpreted as requiring a spring, and  
4 there is just no basis for doing so.

5 THE COURT: All right. Let me hear from  
6 Mr. Hameline.

7 Mr. Hameline, he's indicated that the utilization of  
8 the abstract to be placed in every claim is not appropriate.  
9 What do you think about that and what he says the case is? I  
10 don't know that the case says that. I haven't read the case.

11 MR. HAMELINE: Certainly, Your Honor. There is a  
12 reason that the patent doesn't just have claims, that it has  
13 an abstract, a background, the figures, the specification.  
14 It's to disclose and explain what is in the claims, and  
15 that's what's being done here. It isn't that we are picking  
16 and choosing among various sections to limit the claims. We  
17 are looking at the full expanse of the specification, the  
18 figures, the abstract, the background, all of which teaches  
19 spring.

20 THE COURT: That's at the beginning of every single  
21 patent, is embodied in every single claim. That's not your  
22 position?

23 MR. HAMELINE: That's not our position, no, Your  
24 Honor.

25 THE COURT: In what claims is it done? In what

1 patents?

2 MR. HAMELINE: In these patents.

3 THE COURT: Just in these patents? You mean it's  
4 not done in another case?

5 MR. HAMELINE: Your Honor, every patent is read for  
6 the specific terms in the patent.

7 THE COURT: So every patent you decided separately?

8 MR. HAMELINE: Correct.

9 THE COURT: Whether the abstract is included or not  
10 included?

11 MR. HAMELINE: What you do is you look at the patent  
12 claims and you look at the patent in its entirety.

13 THE COURT: I don't have a problem with that. You  
14 are telling me this is a rule of construction that it fits  
15 into every claim, and if it does, then every time there's an  
16 abstract in every case it would fit in every claim in every  
17 patent; wouldn't it?

18 MR. HAMELINE: That's not what we're saying, Your  
19 Honor.

20 THE COURT: You're not. What are you saying?

21 MR. HAMELINE: Well, what we have said is that the  
22 abstract, the background, the figures, the specification, the  
23 13 to 14 pages -- actually, it is more like 25 pages of the  
24 patent that precede the claims -- all make it very clear that  
25 every embodiment of the invention has a spring, that every

1 reference to the invention refers and recites to a spring,  
2 that a spring is the invention. So when you talk about an  
3 apparatus, you are talking about an invention that has a  
4 spring. All of their products have a spring. Their products  
5 are called the spring float products. They tell us that  
6 their products practice the patents. So they are telling us  
7 the spring is inherent in all of this. We are using the  
8 patent specification --

9 THE COURT: Stop a minute. What difference did it  
10 make in relation to this particular flotation device? Tell  
11 me about that. If you didn't have a spring --

12 MR. HAMELINE: Sure.

13 THE COURT: -- what would you have?

14 MR. HAMELINE: So if you don't have a spring and you  
15 don't have enough buoyancy or a support rod that goes across  
16 the middle, and you lay down in one of these floats -- and  
17 you look at Page 4 again, you will see what the floats look  
18 like -- they taco in the middle. They just go like this  
19 (indicating). So you lay down in them, and there is no way  
20 to keep them flat, and there is just a flotation device on  
21 the outside. They taco up like this (indicating). So you  
22 have a spring around the outside that holds them out and flat  
23 so you just don't get sort of folded down into the middle of  
24 the pancake, and that's what the spring does, and that's why  
25 they do it.

1           They also do it because it's important because you  
2           can open it up and close it and put it in a carrying bag,  
3           because the spring folds up into a figure 8 and folds up into  
4           a much smaller space. That's the essence of their claim.

5           Now, I think what's important here, Your Honor, in  
6           all of these discussions, is that the plaintiffs want the  
7           broadest possible construction possible.

8           THE COURT: And you want the narrowest possible  
9           construction?

10          MR. HAMELINE: We want a narrow and reasonable  
11          construction. Thank you.

12          THE COURT: Okay.

13          MR. HAMELINE: If you have any other questions, Your  
14          Honor.

15          THE COURT: So the spring in this case serves a dual  
16          function? One of the functions is to keep the float erect?

17          MR. HAMELINE: To open, correct.

18          THE COURT: The other function is to be utilized in  
19          folding the document or whatever it is?

20          MR. HAMELINE: Yes.

21          THE COURT: And folding.

22          MR. HAMELINE: That is what they called the  
23          collapsible function, but that's absolutely correct, Your  
24          Honor.

25          THE COURT: Well, that's a good way to think, a

1 collapsible function.

2 MR. HAMELINE: Yep.

3 THE COURT: Bracing or holding function. And so  
4 every claim, therefore, has this spring in it; correct?

5 MR. HAMELINE: Correct.

6 THE COURT: We will see.

7 MR. HAMELINE: Okay. Thank you, Your Honor.

8 THE COURT: Okay. I do think this is a very  
9 important portion of this case.

10 Okay. We go to the next point, Mr. Brady, which is.

11 MR. BRADY: Back support portion and back support  
12 member.

13 THE COURT: Okay. We are now on --

14 MR. BRADY: They don't make --

15 THE COURT: Don't start yet. I'm just not as fast  
16 as you all.

17 MR. BRADY: Some ways addresses this in our  
18 presentation beginning at Page 11.

19 THE COURT: Is this the fifth one we are on? This  
20 is the fourth one, right?

21 MR. BRADY: Yes, I believe that's correct. This is  
22 the fourth; seated position, foot apparatus, now back.

23 THE COURT: Okay. Back support member or back  
24 support portion.

25 MR. BRADY: These are terms that appear in both the

1 '540 patent and the '640 patent. SwimWays' position is that  
2 these terms don't require construction. The specification  
3 provides broad descriptions of different types of back  
4 supports that can be provided. It can be inflatable with a  
5 shared bladder.

6 THE COURT: So Aqua-Leisure maintains that the  
7 specification refers to a back support member only. And  
8 you're saying that it does not require a separate segment or  
9 providing support over and above the perimeter of the buoyant  
10 member?

11 MR. BRADY: That's correct. So Aqua-Leisure took  
12 two positions. First they contend that back support portion  
13 is indefinite because that exact phrase does not appear in  
14 the specification. They also propose as an alternative  
15 position constructions of back support portion and back  
16 support member. I'll start with the constructions first and  
17 then I'll address indefinite.

18 THE COURT: Well, there are two terms, back support  
19 member, back support portion. The portion of the back  
20 support member would not necessarily be the entire member; is  
21 that correct?

22 MR. BRADY: I believe that's correct. Portion  
23 denotes less than all of the whole. But in this case, we  
24 might as well turn to slide 13 of plaintiffs' presentation.  
25 What I have done is I'm addressing the indefiniteness

1 argument in this slide. So Aqua-Leisure is saying the term  
2 "back support portion" is indefinite because it doesn't  
3 appear in the specification, so it must be something  
4 different from back support member.

5 Our position is that's not correct. The patentee  
6 used this term interchangeably in the claims, and this is a  
7 perfect example. I reproduced claim 22 --

8 THE COURT: Which one is the perfect example?

9 MR. BRADY: Claim 22 of the '540 patent.

10 THE COURT: Claim 22 of the '540 patent?

11 MR. BRADY: Yes.

12 THE COURT: You claim it has used interchangeably?

13 MR. BRADY: Yes. This is an example of how the  
14 patentee -- whoever drafted these claims, I think, mistakenly  
15 transitioned from back support portion to back support  
16 member. So I have the claim on Page 13 of our slide -- it's  
17 in the middle -- and I have underlined where the first  
18 instance is the recitation of a back support portion.

19 Then later at line 45 there is a recitation of the  
20 back support portion. So what that means is a back support  
21 portion provides what we call antecedent basis for the back  
22 support portion. Then when you get to five lines down, there  
23 is a reference to the back support member. The back support  
24 member, when we use "the" in a claim, we're referring to some  
25 other structure already recited.

1           Here the only other structure we cited was a back  
2 support portion. Our understanding is that the patentee used  
3 these terms interchangeably; otherwise, there would be no  
4 antecedent basis for the phrase "the back support member" in  
5 claim 22. But there is a rule of construction that we have  
6 to construe in favor of validity. So the only way to  
7 construe "the back support member" for validity would be to  
8 refer back to a back support portion.

9           So our position here is that claim 22 demonstrates  
10 how the applicant meant to use the phrases interchangeably.  
11 You can also see it -- there is over 250 instances of the  
12 word "portion" and over 200 instances of the word "member" in  
13 the specification. They are used interchangeably in numerous  
14 contexts. So because of that, that interchangeability, there  
15 is no ground for indefiniteness.

16           THE COURT: So what you're saying is you're claiming  
17 that they both mean the same thing, but they don't, do they?

18           MR. BRADY: I think they do. A back support portion  
19 of an apparatus is the back support member.

20           THE COURT: The back support portion of an apparatus  
21 may be the back support member. It's possible because that  
22 would be a portion of the apparatus.

23           MR. BRADY: That's correct.

24           THE COURT: I understand that. But we've got to go  
25 through every claim and look at the position of how it's



1 utilized, wouldn't we?

2 MR. BRADY: Absolutely. And we should always return  
3 to the exact claim language. When we are construing these  
4 terms in a vacuum, you lose the context of how it is used,  
5 and that will come up in other limitations later, and I will  
6 raise that issue again.

7 Want to turn briefly to Aqua-Leisure's proposed  
8 construction for these terms. Briefly, there are a couple of  
9 reasons why they're wrong. First is, revisiting the theme of  
10 a separate part, that the back support portion or back  
11 support member must be a separate part. I've already  
12 recited, said a couple of times how the specification teaches  
13 that the back support can be an integral piece with the  
14 inflatable bladder, the support member.

15 For example, on slide 11 I cite to the '540  
16 paragraph or '540 patent at column 8, lines 10 through 12.  
17 That is where we get this, they can form an integral piece.  
18 So the "separate from," I don't think, is appropriate for  
19 these terms. But then there is also --

20 THE COURT: Stop a minute.

21 MR. BRADY: Sure. Slide 11 at the very bottom. If  
22 I may make one more point about another issue. With their  
23 proposed construction, they use the phrase "over and above  
24 the perimeter buoyant member." That phrase would be further  
25 limiting what's present in the claims, the structure that --

1 or to a configuration that is not required by the plain  
2 language. And if you turn to slide 12, that phrase would  
3 exclude an embodiment.

4           The Federal Circuit has told us numerous times that  
5 you have to have persuasive evidence to exclude an  
6 embodiment. Figure 8 shows us the back support member is  
7 below the inflatable bladder. So if the Court were to adopt  
8 Aqua-Leisure's construction and limit a back support member  
9 to a structure that is over and above the perimeter buoyant  
10 member, the Court would be excluding figure 8, that  
11 embodiment, and any modifications of that embodiment  
12 disclosed in the patent.

13           I should also point out that this '640 patent claims  
14 don't use the term "buoyant member." I think they use the  
15 phrase "an inflatable member." And '640 patent, claim 1,  
16 says, "The inflatable member including a back support  
17 portion." It's neither separate nor required to be over and  
18 above a buoyant member.

19           THE COURT: Thank you, Mr. Brady.

20           All right, Mr. Hameline.

21           MR. HAMELINE: Thank you, Your Honor. So, once  
22 again, we start from first principles. The abstract of the  
23 patent says, at the last sentence, it says, "A back  
24 support" --

25           THE COURT: What page are you on of your --

1 MR. HAMELINE: I'm actually looking at the patent,  
2 Your Honor.

3 THE COURT: Okay.

4 MR. HAMELINE: I can hand up a copy.

5 THE COURT: Which patent? '540? I have a patent  
6 here. Just tell me which one you're looking at?

7 MR. HAMELINE: The '540, '640, it's the same.

8 THE COURT: Okay. You are talking about at the  
9 abstract?

10 MR. HAMELINE: At the abstract, the last sentence,  
11 it says, "A back support member and a headrest, both of which  
12 can be inflatable, provide additional support for a user to  
13 maintain a seated position..." And if you look at --

14 THE COURT: Wait a minute. You are talking about  
15 the abstract?

16 MR. HAMELINE: Yes. Last sentence.

17 THE COURT: Last sentence?

18 MR. HAMELINE: I'm sorry, next to last sentence.

19 THE COURT: "...and a headrest, both of which can be  
20 inflatable..."

21 MR. HAMELINE: "Provide additional support." That's  
22 the reference that I'm looking at, "...for a user to maintain  
23 a seated position on the panel."

24 THE COURT: "...provide additional support for a  
25 user to maintain a seated position on the panel."

1 MR. HAMELINE: Right. If you look down directly  
2 below that at the figure, you'll see what is referenced at  
3 110. That's what they're referring to here as the back  
4 support, back support member. What the plaintiffs are trying  
5 to do is, once again --

6 THE COURT: One question I have, is the spring at  
7 110?

8 MR. HAMELINE: 102.

9 THE COURT: But that's the same type of drawing  
10 that's at 110, isn't it?

11 MR. HAMELINE: No. The 110 is pointing to the  
12 whole --

13 THE COURT: I know it's pointing to the formal  
14 thing, and the 102 that you say is the spring?

15 MR. HAMELINE: Yes.

16 THE COURT: What is 107, then?

17 MR. HAMELINE: So, Your Honor --

18 THE COURT: See, what I'm referring to? 107 points  
19 to the spring also; right?

20 MR. HAMELINE: If you look at figure 4 from a  
21 different perspective, that might be helpful to understand  
22 what you're pointing to.

23 THE COURT: I understand what you're pointing to.  
24 I'm trying to make sure I understand what I consider the most  
25 important thing here is the question of the spring.

1 MR. HAMELINE: Yes, Your Honor. If you look at  
2 figure 4, it shows a different perspective. I think that's  
3 helpful to understand what 102 is as opposed to what 110 is.  
4 So 110 is the back rest, the back support member. You'll  
5 see. And 102, down at the very bottom, is the spring, and  
6 it's discussed in the specification where it talks about 102  
7 being the spring.

8 THE COURT: But the spring surrounds it all.

9 MR. HAMELINE: Correct. I'm sorry. 104 is the  
10 spring. 102 is the --

11 THE COURT: You are worse than I am.

12 MR. HAMELINE: I may be, Your Honor. 102 and 104  
13 point to the same thing. It's 104 is called the spring in  
14 the specification.

15 THE COURT: Okay. 102 is not the spring, 104 is the  
16 spring?

17 MR. HAMELINE: Correct.

18 THE COURT: What is 102?

19 MR. HAMELINE: 102 is what is called the panel.  
20 It's a generic reference to the whole part of the -- I don't  
21 know what it is, Your Honor.

22 THE COURT: You got five minutes. Go ahead.

23 MR. HAMELINE: Sure. So what we are talking about  
24 here is that the headrest, the back support member has to be  
25 something in addition to the inner tube. I've showed you

1 where we were looking at the inner tube, and they are trying  
2 to say that an inner tube has a back rest because your back  
3 is against it. The back rest, the back support member has to  
4 be something in addition to it. It has to stick up above.  
5 It has to support the user in a seated position.

6 Their definition, their construction does away with  
7 any distinction between the back support members, which is  
8 110, which stands up and supports the back in the seated  
9 position, and the rest of the buoyant tube that goes around,  
10 essentially the inner tube that goes around. That is  
11 complete contradiction to the figures, the discussion, the  
12 seated position, all of the figures in the patent and the  
13 specification.

14 THE COURT: So you're saying the back support member  
15 refers only to the portion on the back? The back support  
16 portion refers to what?

17 MR. HAMELINE: The back -- if you look at --

18 THE COURT: I'm only asking you what you maintain,  
19 not what they maintain.

20 MR. HAMELINE: Yes. If you look at Page 9 of our  
21 PowerPoint, it addresses the member and portion issue, and it  
22 cites the case law which says, as you correctly stated, if  
23 they use different terms in a patent, they should mean  
24 different things, and this is the case that cites that.

25 In our brief we talk about the difference between a

1 member and a portion, and while it's unclear from the  
2 specification, what we've tried to do is understand how it  
3 works in some way and isn't internally contradictory.

4 THE COURT: I can understand that. What we have to  
5 do is we have to start going through the claims one at a  
6 time.

7 MR. HAMELINE: Yes.

8 THE COURT: So let's start looking at them where you  
9 are saying you have some problem understanding it. I don't  
10 have much problem between what a member is and what a portion  
11 is. The question is how it's utilized in particular claims.  
12 So you tell me what your interpretation of each and every  
13 claim is in which it's used and we'll go down them. We are  
14 going to take some time with it because I think it's  
15 important.

16 MR. HAMELINE: So generally, Your Honor --

17 THE COURT: So let's start with '540.

18 MR. HAMELINE: Yep.

19 THE COURT: And see where you claim that it's  
20 something entirely separate and apart. Okay.

21 MR. HAMELINE: It's not entirely separate and apart.  
22 It's a separate member, and therefore it's not just part of  
23 the tube.

24 THE COURT: Let's go down each claim so I'll  
25 understand it without trying to do it abstractly.

1 MR. HAMELINE: Sure. Claim 1 of the '540 patent.

2 THE COURT: Let's go down. Claim 1 in which patent?

3 MR. HAMELINE: The '540 patent in column 14, second  
4 claim element reads, "A back support member coupled to at  
5 least a part..."

6 THE COURT: Where are we in this particular one?

7 MR. HAMELINE: If you look, we are on line 43. If  
8 you look at the numbers down the middle of the page, it  
9 denotes the lines.

10 THE COURT: Where it says, "The outer portion may  
11 include a sleeve, one or more inflatable bladders, a back  
12 support member, and a foot support member"? Is that what  
13 you're talking about?

14 MR. HAMELINE: In column 14 of the patent, Your  
15 Honor, line 43, the lines are denoted in the middle of the  
16 page, you will see 5, 10, 15, 20, 25.

17 THE COURT: This is not in column 4?

18 MR. HAMELINE: Is that the '540 patent? It is  
19 column 14, Your Honor.

20 THE COURT: Okay. What is claimed is "an apparatus,  
21 comprising," correct?

22 MR. HAMELINE: Your Honor, I can hand up --

23 THE COURT: "A back support member coupled to at  
24 least part of the inner portion of the panel"?

25 MR. HAMELINE: Correct, Your Honor. That's the



1 first place that I see back support member used in claim 1 of  
2 the '540 patent.

3 THE COURT: What do you contend it says?

4 MR. HAMELINE: Well, I contend, when you look at  
5 figure 1 of the patent, it means that that back support  
6 member is a separate inflatable bladder that provides support  
7 for a user in a seated position, and obviously it is in  
8 addition to that outer inflatable tube or inflatable member  
9 or buoyant member.

10 THE COURT: You are saying the "back support member  
11 coupled to at least part of the inner portion of the panel"?

12 MR. HAMELINE: Correct. By that what they mean --

13 THE COURT: So what do you contend that means?

14 MR. HAMELINE: So the "back support member coupled  
15 to at least part of the inner portion of the panel." The  
16 inner portion of the panel is the mesh that the user sits on  
17 or the fabric the user sits on, but the back support member,  
18 in and of itself, means a part of the device, the apparatus,  
19 that is in addition to this outer member, the outer buoyant  
20 member, and therefore provides that support over and above  
21 the outer buoyant member to support a user in a seated  
22 position exactly as 110 denotes in the figure.

23 THE COURT: What do you contend it does? All I'm  
24 seeing here is "a back support member coupled to at least  
25 part of the inner portion of the panel."

1 MR. HAMELINE: Right. I'm telling you.

2 THE COURT: What's the problem there?

3 MR. HAMELINE: I'm telling you what my understanding  
4 from the specification is.

5 THE COURT: So your understanding is that the back  
6 support member is not back support member?

7 MR. HAMELINE: No. My understanding is that's  
8 exactly --

9 THE COURT: What is your understanding?

10 MR. HAMELINE: My understanding is that's exactly  
11 what it is, and that's the way it should be defined, as  
12 opposed to being simply part of the inner tube without  
13 extending up.

14 THE COURT: All of this periphery, I'm looking at  
15 the meaning of this, "A back support member coupled to at  
16 least part of the inner portion of the panel."

17 MR. HAMELINE: Correct.

18 THE COURT: I don't have any problem understanding  
19 that. You say you have a problem, you want to change that?

20 MR. HAMELINE: No. We want it defined exactly what  
21 back support member means.

22 THE COURT: You want to define it. I don't have any  
23 problems with it. It's simple. It's coupled to it.

24 MR. HAMELINE: The term "back support member" is  
25 what we are construing, not what it is coupled to.

1 THE COURT: I understand that. I don't have any  
2 problem with that.

3 MR. HAMELINE: As long as we understand, Your Honor,  
4 that it is something in addition to.

5 THE COURT: You are saying the back support member  
6 is not the back support member?

7 MR. HAMELINE: I'm saying it precisely is.

8 THE COURT: Something else is coupled to the inner  
9 portion?

10 MR. HAMELINE: Absolutely not, Your Honor. I am the  
11 one who is saying a back support member actually provides the  
12 back support above and beyond the inner tube.

13 THE COURT: What I'm trying to do now is to figure  
14 out where there's a difference between your meaning and the  
15 meanings that are in the claim. This claim does not give me  
16 any problem. Show me one that gives me a problem.

17 MR. HAMELINE: Well, Your Honor, the issue is what  
18 does back support member mean. If it means --

19 THE COURT: Stop. Give me another one that shows a  
20 different interpretation.

21 MR. HAMELINE: The term "back support member" is  
22 used in the claims, so that's what it means.

23 THE COURT: You're very nice to go through that. I  
24 want to go through claim by claim because I'm having a little  
25 difficulty understanding your argument because it's too

1 general. I'm asking you to make it specific. I'm giving you  
2 more time to make it specific here. What we are trying to  
3 construe are words contained in claims.

4 MR. HAMELINE: Correct. And the words that we  
5 are --

6 THE COURT: And that is what is so important, so I  
7 want to go down these claims to see what it is other than an  
8 abstract proposition. I don't like the interpretation that  
9 the plaintiff has. I want to know how you interpret each of  
10 these claims. You keep writing in something else. I know  
11 that the back support member is coupled to at least part of  
12 the inner portion of the panel.

13 MR. HAMELINE: Correct.

14 THE COURT: So are we going to have a problem with  
15 coupled later? But that's all right.

16 MR. HAMELINE: Correct, Your Honor, yes.

17 THE COURT: So everything we have a problem with  
18 affects everything else; correct?

19 MR. HAMELINE: Correct, Your Honor.

20 THE COURT: So there's nothing that just in and of  
21 itself is there. So do we have to define the word "coupled"  
22 at this point?

23 MR. HAMELINE: No, we do not.

24 THE COURT: We do not. Well, what do you understand  
25 that to mean here?

1 MR. HAMELINE: Coupled?

2 THE COURT: Yeah.

3 MR. HAMELINE: So the mesh on the bottom or the  
4 fabric on the bottom that the user lays or sits on is  
5 physically joined to the back support member. Coupled.

6 THE COURT: Coupled is physically joined?

7 MR. HAMELINE: Correct.

8 THE COURT: So the husband and wife are physically  
9 joined. I see a couple of those. Adam and Eve are  
10 physically joined.

11 MR. HAMELINE: I think the term may be used in  
12 different context, Your Honor.

13 THE COURT: Well, I understand it's different. What  
14 I'm finding out is all words are different. If you place  
15 them in different places and say, well, they are different.  
16 In any event, let's go back to "back support member." I'm  
17 concerned about this, and that is that where is it used in  
18 some other place and when is the next reference to it in the  
19 '540 patent in a claim?

20 MR. HAMELINE: Yes, Your Honor. I'd have to go to  
21 the '540 and look at the next claim.

22 THE COURT: '540 and the next claim is claim 2?

23 MR. HAMELINE: Yes.

24 THE COURT: Okay.

25 MR. HAMELINE: Claim 2 simply incorporates claim 1

1 so it doesn't use "back support member" in a different  
2 fashion. Claim 15 --

3 THE COURT: So the next reference is to claim 15?

4 MR. HAMELINE: Well, that's the next one that I see  
5 directly, Your Honor.

6 THE COURT: An apparatus comprising a panel.

7 MR. HAMELINE: And the next paragraph, yes: "A back  
8 support member coupled to at least one of the first portion  
9 or the second portion of the panel."

10 THE COURT: Do you have any problem understanding  
11 that?

12 MR. HAMELINE: I don't have a problem understanding  
13 it, Your Honor.

14 THE COURT: I don't either.

15 MR. HAMELINE: I think the key is what are they  
16 going to say, when we're actually doing the case, back  
17 support member means.

18 THE COURT: So what you're saying is no problem  
19 understanding that?

20 MR. HAMELINE: I don't think there should be, Your  
21 Honor.

22 THE COURT: Okay.

23 MR. HAMELINE: Thank you.

24 THE COURT: I don't have any problem understanding  
25 it. What's next?

1           MR. HAMELINE: I guess we look at the next  
2 independent claim.

3           THE COURT: Then we have another thing down here, it  
4 says, "Back support member and the second portion of the  
5 panel collectively defined an inner perimeter," and so forth.  
6 Do you have any problem with that?

7           MR. HAMELINE: I don't, Your Honor. I don't think  
8 this claim is actually asserted. I was just pointing it out  
9 that it was the next claim. I don't. Again, it's not the  
10 overall sentence, it's what does "back support member" mean  
11 in the context of how they're going to try to apply it.

12           THE COURT: You talk about -- well, I skipped some  
13 part. I shouldn't have skipped any. It says, "Back support  
14 member having a front surface in contact with the first  
15 portion of the panel, the front surface of the back support  
16 member having a first side edge and a second side edge  
17 opposite the first side edge, a distance between the first  
18 side edge and the second side edge defining a width of the  
19 back support member, the width of the back support member  
20 being a first width, a second width being defined  
21 collectively by the first portion of the panel and the second  
22 portion of the panel, the first width and the second width  
23 being measured along substantially the same direction...the  
24 back support member in the second portion of the panel  
25 collectively..." -- so far I don't have any problem.

1           Then we go down, "Each terminating at the back  
2 support member, the first portion of the panel being disposed  
3 within and" -- then we get down to claim 15. "Wherein: The  
4 back support member has a side wall extending between the  
5 front surface and the back surface of the back support  
6 member, a distance between the front surface and the back  
7 surface measured across the side wall of the back support  
8 member defines a length of the back support member, the  
9 length of the back support member is a first length."

10           MR. HAMELINE: Your Honor, I don't think claim 15 is  
11 actually asserted in the case so the context may or may not  
12 be important. The context that I was trying to provide here  
13 is that if they --

14           THE COURT: I'm going down them one by one to see if  
15 there is anything I don't understand.

16           MR. HAMELINE: I can tell you where the issue is  
17 coming up, is whether the deluxe aqua chair has a back  
18 support member even though it's basically an inner tube, and  
19 that's where their interpretation becomes an issue.

20           THE COURT: So what you're saying is that the issue  
21 is exactly what -- maybe you better tell me, Mr. Hameline.

22           MR. HAMELINE: Sure. So what we were saying is that  
23 the back support member, as articulated in the figures in the  
24 patent, particularly part 110 that is referenced and we  
25 talked about, talks about the back support member and shows,



1 actually pictures the back support member as something that  
2 rises up above the rest of the inner buoyant tube to provide  
3 support for a user, the back in the seated position.

4 THE COURT: The back support member has to provide  
5 some support, unquestionably.

6 MR. HAMELINE: Yes, for additional support for the  
7 back to put the user in the seated position. They are going  
8 to argue that the deluxe aqua chair is basically an inner  
9 tube, has a back support member.

10 THE COURT: You are saying the seated position, and  
11 you wouldn't agree on what was seated. You're saying that  
12 it's a 90-degree seat?

13 MR. HAMELINE: What I'm doing is reading the patent  
14 at this point, Your Honor.

15 THE COURT: Well, Mr. Hameline, you are good. I've  
16 got to give you that. You are very good.

17 MR. HAMELINE: I'm just reading from the abstract  
18 where it says, "A back support member...which...provide  
19 additional support for a user to maintain a seated position  
20 on the panel."

21 THE COURT: Let's go with the question, you're  
22 saying a particular claim is at issue; correct?

23 MR. HAMELINE: Correct.

24 THE COURT: Which claim is it that you feel is at  
25 issue?

1 MR. HAMELINE: Well, I think in the '540 patent,  
2 claim 1 that talks about a back support member, if they are  
3 trying to say the back support member --

4 THE COURT: Forget what they are trying to say. How  
5 does it affect you?

6 MR. HAMELINE: Exactly. If the back support member  
7 is simply wherever you put your back on the inner tube, we  
8 believe that is an incorrect construction of the term "back  
9 support member." We believe it has to have some additional  
10 size and support, just like in figure 1, figure 110, et  
11 cetera, in the figures over and above.

12 THE COURT: What claim is it that you dispute so  
13 that I could get to the claim that they claim affects you?

14 MR. HAMELINE: Sure. So if you look at claim 1 of  
15 the '540 patent where it says "a back support member," they  
16 argue, when they argue that the deluxe aqua chair has a back  
17 support, our position is it does not have a back support  
18 member because it does not have any size, any --

19 THE COURT: It doesn't have anything that supports a  
20 back, in your thing?

21 MR. HAMELINE: Thank you, Your Honor.

22 THE COURT: Your back is not supported; correct?

23 MR. HAMELINE: A back is supported if it's supported  
24 at all by the inner tube.

25 THE COURT: It's not supported, period; is that what

1 you're saying?

2 MR. HAMELINE: I'm saying if it's supported, it's by  
3 the inner tube. There is no back support member.

4 THE COURT: There is no back support?

5 MR. HAMELINE: Okay.

6 THE COURT: Is it or is it not? What I'm trying to  
7 figure out is what is the issue?

8 MR. HAMELINE: The issue is whether this deluxe aqua  
9 chair has a back support member.

10 THE COURT: All right. Stop. I'll go to your --  
11 what page is that on?

12 MR. HAMELINE: Page 3, Your Honor.

13 THE COURT: Page 3?

14 MR. HAMELINE: Correct.

15 THE COURT: Page 3?

16 MR. HAMELINE: Correct.

17 THE COURT: The deluxe aqua chair has no back  
18 support; correct?

19 MR. HAMELINE: It has no back support member,  
20 correct, or back support portion; correct. That's our point.

21 THE COURT: Okay. Now I understand where we are  
22 going.

23 MR. HAMELINE: Okay. I apologize it took that long,  
24 Your Honor.

25 THE COURT: Has no back support, and, therefore, it

1 has no springs; correct?

2 MR. HAMELINE: Correct.

3 THE COURT: What is that thing going around, the  
4 white thing or the yellow?

5 MR. HAMELINE: It's a piping. It's simply a piece  
6 of fabric they sew on to have it look pretty.

7 THE COURT: It's not a spring?

8 MR. HAMELINE: No.

9 THE COURT: It doesn't hold a thing together?

10 MR. HAMELINE: No. I have one here if you'd like to  
11 see it. There is no spring.

12 THE COURT: Okay. A spring is only something that  
13 holds it together, and this thing doesn't hold it together?  
14 We better look at it. You got it? Bring it in. What the  
15 heck.

16 MR. HAMELINE: Obviously, Your Honor, it's not  
17 inflated, but you can see when it inflates, obviously, the  
18 outer portion inflates like an inner tube, and it is  
19 essentially a six-sided inner tube with the portion that you  
20 can lay down on in the middle. And the piping is -- can I?

21 MR. BRADY: May I stand up and watch?

22 THE COURT: I'm going to let you look at it in a  
23 minute. Just take your time.

24 MR. ALBERT: Your Honor, if you would like, we can  
25 inflate these during the lunch break.

1 THE COURT: Okay. Do you have a copy of yours,  
2 Mr. Brady? You don't have a copy of yours?

3 MR. BRADY: I did not bring it.

4 THE COURT: Okay.

5 MR. BRADY: We can have it delivered.

6 THE COURT: That's all right. Put that back.

7 COURT SECURITY OFFICER: Yes, sir.

8 THE COURT: Just wanted to see what it was. So what  
9 you maintain is this deluxe aqua chair, you want to be able  
10 to utilize that?

11 MR. HAMELINE: Correct, Your Honor.

12 THE COURT: But not the recliner?

13 MR. HAMELINE: No, the recliner, too, Your Honor,  
14 for different reasons. There are many, many elements in  
15 these claims.

16 THE COURT: You want to also use the two-in-one  
17 water lounge?

18 MR. HAMELINE: Correct.

19 THE COURT: Well, that's interesting. What you're  
20 saying is that that's not a back support in the two-in-one  
21 water lounge?

22 MR. HAMELINE: Oh, it's a back support. It may not  
23 be a back support portion. It may be a back support member.

24 THE COURT: Not even a back support?

25 MR. HAMELINE: I think it's a back -- most likely a

1 back support. I'm not sure it puts somebody in seated  
2 position, but it's one of the many elements that they have in  
3 the patent claim. This one, the two-in-one looks like a --  
4 you know, depending on how you define back support member, it  
5 certainly, you know, could fall within that. The deluxe aqua  
6 chair is what we are trying to discuss to show you what the  
7 issue is.

8 THE COURT: I want to hear Mr. Brady.

9 Mr. Brady, I'm looking at this deluxe aqua chair.  
10 He says it has no back support in it. Look at his figures.  
11 He says he can use a recliner because he doesn't call it a  
12 back support. The two-in-one water lounge is not a back  
13 support, supports something else?

14 MR. BRADY: Well, Your Honor, I think we might be  
15 straying from claim construction, visiting issues of  
16 infringement.

17 THE COURT: Right. We are. But I want to find out  
18 where we are going, Mr. Brady.

19 MR. BRADY: Absolutely. So the question is going to  
20 be whether the facts show that there is a back support member  
21 or portion, depending on which claim we are talking about,  
22 present in the deluxe aqua chair. I think what we will see  
23 is evidence relating to the relative diameter of specific  
24 portions of that device that in a certain area, which you  
25 can't see because her back is blocking it, it's larger than

1 other portions of the tube.

2 THE COURT: I'm not going to worry about that. I  
3 just was curious as to where we are going and what the  
4 construction of back support member is. I'm having some  
5 problems thinking that in some instances the back support  
6 member is referred to as a portion, the back support portion  
7 of an apparatus, which doesn't give me any problem. I've  
8 been trying to figure out where the problem was in the claims  
9 itself. Maybe you could point out to me where there may be  
10 some differentiation.

11 MR. BRADY: I don't think there is anything for me  
12 to point out in that regard, depending on which claim we are  
13 talking about.

14 THE COURT: Have a seat. Let me get back to  
15 Mr. Hameline.

16 Mr. Hameline, show me here where there is, so I go  
17 back to claims and not get myself waylaid off.

18 MR. HAMELINE: I would go back to claim 1 of the  
19 '540 patent.

20 THE COURT: You keep getting back to this abstract  
21 situation. Forget the abstract. Show me the claim.

22 MR. HAMELINE: Claim 1 of the '540 patent.

23 THE COURT: You keep going back to the abstract.  
24 I'm not dealing with the abstract.

25 MR. HAMELINE: No, I'm not dealing with abstract.

1 I'm dealing with a claim, claim 1 of the '540 patent.

2 THE COURT: Okay.

3 MR. HAMELINE: Where it says a back support member.  
4 We are trying to define --

5 THE COURT: What you're saying is the member has to  
6 be separate and apart from any portion of the member?

7 MR. HAMELINE: The member has to be separate and  
8 apart from the other members, such as the buoyant member or  
9 the foot support member. But, more importantly, it has to  
10 provide --

11 THE COURT: So what you're saying is the back  
12 support member cannot be part of anything else; correct?

13 MR. HAMELINE: Well, it's part of the overall  
14 apparatus. It's a separate bladder, yes.

15 THE COURT: Separate and distinct, is your  
16 interpretation?

17 MR. HAMELINE: That's what a separate bladder is,  
18 yes, Your Honor.

19 THE COURT: Now, that doesn't seem to make any  
20 distinction. So what difference does that make?

21 MR. HAMELINE: Well, if on the figure we have been  
22 looking at, which is figure 1 --

23 THE COURT: Forget the figures a minute because --  
24 your figures in the patent, yes, figure 1.

25 MR. HAMELINE: So figure 1 shows 110, the back



1 support, and if that's a back support member, what is  
2 referenced as 110 is a bladder.

3 THE COURT: So you're saying figure 1 defines the  
4 case?

5 MR. HAMELINE: In many ways it does, yes. It's the  
6 first --

7 THE COURT: If you're not in the figures, you lose  
8 your claim; correct?

9 MR. HAMELINE: Generally that's correct, Your Honor.

10 THE COURT: So you've got some law, some case that I  
11 can rely on, if you don't put it in a figure, your claim  
12 dies?

13 MR. HAMELINE: No. What we have is a patent claim  
14 that uses the term "back support member."

15 THE COURT: I understand, Mr. Hameline. I'm asking  
16 you do you have a case that says if it's not in the figure --  
17 the claim is bound by the figure?

18 MR. HAMELINE: No, Your Honor. The law is that the  
19 claims are defined. The claim terms are defined in the  
20 specification and with reference to the figures. That's what  
21 the Federal Circuit tells us.

22 THE COURT: Well, I'm sure you must have answered  
23 the question in a manner in which only Mr. Albert understood.  
24 I don't think anyone else did.

25 MR. ALBERT: Your Honor, I noticed -- I was going to

1 say I noticed you don't have your law clerk here but you had  
2 indicated the Court needed to step down at 11:45.

3 THE COURT: It's not quite that yet, got five more  
4 minutes. I still want to find out where it is in the claim  
5 that we are talking about, and that's what's giving me some  
6 difficulty. I'll probably try to go through the entire  
7 matter and see what it is myself and to see if there is a  
8 differentiation. That's really the problem, because  
9 unquestionably a portion of the back support member would be  
10 in the apparatus. It may not be all of it in the apparatus  
11 because they talk about a portion, and I assume "portion" has  
12 some meaning. So don't get concerned about that. Portion  
13 has a meaning. I'm going to look at the claims to see if the  
14 meaning would differentiate in this case.

15 When we come back at 2:15, you'll start.

16 MR. HAMELINE: Thank you, Your Honor.

17 THE COURT: You will start on the fifth one. We  
18 will keep going from there.

19 MR. HAMELINE: Thank you very much, Your Honor.

20 (Recess from 11:43 a.m. to 2:17 p.m.)

21 THE COURT: All right, Mr. Hameline. You can start  
22 with number five.

23 MR. HAMELINE: Number five, Your Honor, the term is  
24 "coupled," is the term used in the '540 and the '640 patent.

25 THE COURT: You're maintaining that you have to be

1 physically attached?

2 MR. HAMELINE: Correct. There has to be a physical  
3 joinder between the two things that are coupled.

4 THE COURT: The problem about defining words is  
5 defining them with regard to the context in which they are  
6 located. Oftentimes we are trying to define words without  
7 regard to the context in which they're located.

8 So to that extent, "coupled" is an interesting word  
9 because it does not mean physically attached, in and of  
10 itself. In a certain context it may mean just that, but it  
11 doesn't necessarily mean so. That's what bothers me.

12 So the question then will come, the word is not  
13 difficult to understand, and I think its ordinary meaning is  
14 there. The question about how it's used is entirely  
15 different.

16 MR. HAMELINE: Your Honor, to step back from all of  
17 this, the difficulty in a *Markman* hearing is they are so  
18 abstract, rather than a summary judgment hearing where you've  
19 got the product and the term and you compare the two and  
20 apply it. I agree completely that it's hard to do in many of  
21 these claims, and that's why you look to specific uses of the  
22 term in the specification.

23 THE COURT: Well, when we're dealing with meanings,  
24 I worry because meanings of words do not change. The  
25 utilization of the word changes, not the meaning of the word.

1 So it's how it's utilized in a particular context. And that  
2 would depend on the case that's involved, in and of itself,  
3 and not on what we're dealing with here today, that is,  
4 trying to define a word abstractly that is a word of ordinary  
5 meaning, it doesn't take any specialized knowledge. I'm  
6 having lots of problems because none of these words seem to  
7 have specialized knowledge.

8 MR. HAMELINE: Well, with words like "coupled,"  
9 which, you know, could be used as an adverb, et cetera, in  
10 this context, I don't disagree with you. With specific terms  
11 that define specific parts of the apparatus, like the back  
12 support member, I think that does have specific meaning  
13 because it means something in the context of this patent.

14 THE COURT: You've argued the back support member.  
15 Don't argue.

16 MR. HAMELINE: Don't go back there, yes.

17 THE COURT: We've got enough to worry about.

18 MR. HAMELINE: Your Honor, I will make one point on  
19 coupled.

20 THE COURT: Okay.

21 MR. HAMELINE: So we argue that it means physically  
22 attached, directly attached, et cetera. They seem to argue  
23 that it can be indirectly attached, and sort of the -- what I  
24 am concerned about is that the logical extension, if they  
25 take theirs to the fullest, you know, extension, which I

1 don't think has anything to do with what we are talking about  
2 here is, that my sock is attached to my hat because they are  
3 indirectly coupled because they're all part of the same  
4 clothing; or that in a car, a tire is coupled to the radiator  
5 because they're all indirectly coupled in some ways, and no  
6 one would ever say that those two things are coupled within  
7 the normal course of business. That's what I'm trying to  
8 distinguish.

9 THE COURT: I don't think you have any problem in  
10 relation to that because the word "coupled" has a meaning,  
11 and it doesn't mean physically attached. It may indicate  
12 that in a particular context something is physically  
13 attached. So that's all one can say. So you could look at  
14 one place where it might be physically attached or touching.  
15 Doesn't mean it has to be attached as such. It could be  
16 touching or it could be not even touching and still be  
17 attached.

18 MR. HAMELINE: Your Honor, I would submit that in  
19 the briefs we refer to the provisions in the patent which use  
20 the word "coupled," and I would submit on the briefs that  
21 that's where this is. I think it's a very detailed argument  
22 at that point. I don't disagree with your general point, but  
23 I do think in this case "coupled" is used in the context of  
24 the patent in that fashion, and I would submit on the briefs  
25 on this issue really.

1 THE COURT: Thank you, Mr. Hameline. I want to hear  
2 what Mr. Brady says.

3 MR. BRADY: Your Honor, frankly, I don't have  
4 anything to add beyond what we have already argued in the  
5 briefs, unless the Court has any particular questions.

6 THE COURT: I don't have any. Thank you, Mr. Brady.  
7 Next point, Mr. Hameline, is the next one down.

8 MR. HAMELINE: Thank you, Your Honor. I think we  
9 are moving faster than five minutes, hopefully, with some of  
10 these terms. The next term is "buoyant member." See if I  
11 can open my -- is the next term "buoyant member" or is it  
12 "opening"?

13 THE COURT: You were just on "coupled," and I have  
14 "buoyant member."

15 MR. HAMELINE: I have "buoyant member." Is that the  
16 next?

17 MR. BRADY: It is, Your Honor. The issue is  
18 plaintiffs identify two terms that raise construction issues  
19 based on noninfringement argument. We went ahead and briefed  
20 them because I was telling the issue at trial will be an  
21 issue that the jury will have to decide. So the next one  
22 could be "opening," or according to using our joint  
23 submission, it would be "buoyant member."

24 MR. HAMELINE: Whichever. We can do opening as the  
25 next one in my chart on Page 37, Your Honor.

1 THE COURT: Let me see what you have to say.

2 MR. HAMELINE: Yes. The term "opening" is used in  
3 the patent, and our position is that an opening is an  
4 opening. It requires a physical hole or gap or some opening  
5 in the device, and I think plaintiffs' position is it's an  
6 opening, but an opening, in terms of a wall or something, is  
7 an opening in the wall can be -- still be an opening if  
8 there's a door there or if it's covered.

9 Our position is, with respect to the float, and this  
10 is precisely the issue, Your Honor, that we are facing, is if  
11 this is an opening, and it is not covered, it's an opening.  
12 If there is mesh here, it's not an opening, it's covered.  
13 That's the scope of this, and we think the normal term  
14 "opening" means it's not covered. If they want to say it's  
15 an opening that is now covered with mesh, the claim can say  
16 that, and that's what it would mean. But as far as opening  
17 alone means, it means (indicating) without material there.

18 THE COURT: I'm going to let it wait.

19 MR. HAMELINE: Thank you, Your Honor.

20 THE COURT: That's the end of that.

21 MR. HAMELINE: The next term is "buoyant member,"  
22 Your Honor. I assume since you are letting it wait, Your  
23 Honor, Mr. Brady is -- you don't expect to hear from  
24 Mr. Brady on "opening," you're going to let it --

25 THE COURT: Unless he doesn't want me to wait.

1 MR. BRADY: That's fine, Your Honor.

2 THE COURT: All right, Mr. Brady.

3 Okay. I thought -- what happened to "buoyant  
4 member"?

5 MR. HAMELINE: We are going to get to "buoyant  
6 member" right now.

7 THE COURT: Okay.

8 MR. HAMELINE: "Buoyant member" is a claim term in  
9 the '540 patent, and this gets back to the issue that we  
10 spoke of when we started the discussion of what's the  
11 difference between a buoyant member and inflatable member or  
12 back support member, a support member, and a foot support  
13 member.

14 Their interpretation is that it is a member  
15 providing buoyancy. In that case it is not distinguished  
16 from the terms that are used in the claims, back support  
17 member, support member, foot member, foot support member,  
18 inflatable member. It is a term that is used, it is used  
19 specifically, it should have a meaning. Our meaning is that  
20 it is an inflatable -- part of the flotation device separate  
21 from the back support, support member and foot support member  
22 which enables flotation being comprised of an inflatable  
23 bladder or inflatable bladders.

24 The importance here is that if the people who wrote  
25 the patent, and the inventors, thought it was important to



1 distinguish and have names for these various different  
2 members, then it should have a different meaning, period.

3 THE COURT: All right. Mr. Brady.

4 MR. BRADY: Just a couple of points on this term.

5 THE COURT: All right.

6 MR. BRADY: The term is "buoyant member." The  
7 specification teaches, and what I have on the screen right  
8 now, '540 patent at column 13, ending at line 61, that --

9 THE COURT: Stop a minute. It's not on my screen.  
10 Okay. Thank you. Here it is.

11 MR. BRADY: Identified here where the specification  
12 teaches that the buoyant member can be something providing  
13 buoyancy other than an inflatable chamber, such as a foam  
14 insert. The point being that the buoyant member is not  
15 limited to an inflatable bladder or bladders.

16 THE COURT: All you're just saying that any member  
17 that's buoyant is a buoyant member?

18 MR. BRADY: I believe that's accurately stated. If  
19 it is a member that provides buoyancy. It could be a number  
20 of different things. An inflatable bladder is certainly one,  
21 foam insert.

22 THE COURT: They are saying that a buoyant member,  
23 to be that, the buoyant member has to be separate and apart  
24 from another buoyant member?

25 MR. BRADY: That's an argument that's going to come

1 up in the next term, but the entire separate-from theme that  
2 they are advancing is inconsistent with the teachings. There  
3 are several instances that teach these components can be  
4 integral with other components. So we can have an integral  
5 device with buoyant members and a back member.

6 I should also note that the back member does not  
7 have to be inflatable. The back support member does not have  
8 to be buoyant. That's not required by all of the claims. It  
9 could be. There are numerous embodiments disclosed where it  
10 is inflatable, either with the same inflatable chamber or  
11 with its own inflatable chamber, but that's not an absolute  
12 requirement for every embodiment.

13 The same goes with the foot support or the foot  
14 support member. In some embodiments it can be inflatable,  
15 but it doesn't have to be. So based on that scope, limiting  
16 buoyant member as Aqua-Leisure's proposed, is inconsistent  
17 with the specification. There is even claims, for example,  
18 on this screen now at the bottom, '540 patent, claim 3, says,  
19 "...the back support member is inflatable and in fluid  
20 communication with the buoyant member."

21 So I'm not sure how they can be separate from each  
22 other if they're in fluid communication. In some embodiments  
23 they might be, but the claims do not require it. That is all  
24 I have to say.

25 THE COURT: Thank you.

1           Next, Mr. Hameline.

2           MR. HAMELINE: Yes. The next is "buoyant member  
3 having a first portion and a second portion." Again, we are  
4 back to the same issue here, which is if somebody thought the  
5 inventor, the patent attorney who wrote these, the patent  
6 examiner who allowed them, thought that these terms were  
7 important enough to put in the claim, they must mean  
8 something. It can't just mean first portion, second portion.

9           Again, I go back to our slide at the very beginning,  
10 which is Page 7, which is the inner tube, where you can point  
11 to any part of the inner tube as the foot support member, the  
12 buoyant member first portion, the buoyant member second  
13 portion, the buoyant member -- the back support member. At  
14 some point they need to come forward with a description of  
15 what their patent is, what it means, and the scope of what it  
16 claims.

17           I think that's something they need to do on first  
18 portion and second portion. I haven't seen it. I haven't  
19 seen them do it with basically any of these, but particularly  
20 here at some point they can't just point to the lectern and  
21 say, here is the first portion, here is the second portion;  
22 oh, no, today here is the first portion, and here is the  
23 second portion. There has to be some delineation of what the  
24 claim means.

25           THE COURT: What do you think it is or isn't?

1           MR. HAMELINE: I don't know. I think it's entirely  
2 indefinite. I don't think it can be interpreted and applied,  
3 and I think they need to come forward with something that  
4 tells us how, if I am somebody who is looking at the patent,  
5 person of ordinary skill in the art, how do I understand what  
6 the patent claims?

7           And this is more of an example of the problem with  
8 the others, but I thought it was a glaring example of  
9 something that says the patent, as we just heard with respect  
10 to "buoyant member," the patent means anything and  
11 everything, and that's what we have, and that's the problem  
12 we have in trying to understand, as somebody who's out in the  
13 market, with pool floats, which, frankly, are not the most  
14 complex thing in the world. What does it mean that they have  
15 a claim? They don't have a claim on all pool floats, that's  
16 clear. But what is it that they are claiming, and we have a  
17 lot of problem, and to get around that problem, we'd like to  
18 know decisively from them what they are claiming here.

19           THE COURT: You are talking about claims 1 and 21;  
20 right? Is that correct?

21           MR. BRADY: Yes, Your Honor. The terms we are  
22 talking about are "buoyant member having a first portion and  
23 a second portion." When we are drafting claims, we use first  
24 and second as a device to identify things that have some  
25 relationship later. On the screen now I have highlighted an

1 excerpt from the '540 patent, claim 1, the bottom left.  
2 That's where we first see the recitation of the buoyant  
3 member having a first portion and a second portion. But then  
4 later we are talking about the inner portion of the panel  
5 extending continuously between the first portion and the  
6 second portion. That's why we've identified a first and a  
7 second portion previously so that we can talk about its  
8 relationship spatially to that seat or the mesh member.

9 Now, I've already mentioned it several times today  
10 that the specifications teach that you can have a single  
11 inflatable bladder in an embodiment. Figure 6, which I've  
12 shown here just for demonstrative purposes, it's described as  
13 having a single buoyant member that's actually integral with  
14 item 206, the support member. So it forms at least a "U"  
15 shape. And I've identified on here, I've annotated a first  
16 portion and a second portion.

17 The reason I can do that is that now I need to look  
18 at it and say does the inner portion of the panel continue  
19 continuously between those portions. So in the context of  
20 the entire claim, the language is straightforward. No terms  
21 require construction. The only issue is whether an accused  
22 product meets this configuration, and not all pool floats do.  
23 This is really an infringement issue. There is nothing for  
24 construction. There is no requirement in the claim language  
25 itself for separate parts of the buoyant member --

1 THE COURT: Figure 6 is the same buoyant member?

2 MR. BRADY: That's correct, it is the same buoyant  
3 member. It's a hole, and we are identifying two portions of  
4 that hole.

5 THE COURT: Okay. I understand your argument.  
6 Okay. We are going now to "extending continuously"?

7 MR. HAMELINE: Correct, Your Honor. That's on Page  
8 48 of our package, the PowerPoint that we gave you.

9 THE COURT: Page 48?

10 MR. HAMELINE: Page 48, yes, Your Honor. And the  
11 entire claim term that we are looking at, and SwimWays is  
12 correct on this, is that the inner portion extend  
13 continuously between the first and second portions of the  
14 buoyant member without an intervening buoyant member.

15 So, if you will, if I can just use this as a  
16 demonstrative, the issue is does this inner panel here extend  
17 continuously to the buoyant member here and the buoyant  
18 member here (indicating)? In our product, there is a mesh.  
19 It doesn't connect. It doesn't extend continuously. The  
20 second issue --

21 THE COURT: Stop a minute. I'm going back to  
22 "extending continuously."

23 MR. HAMELINE: Yes.

24 THE COURT: Now, this was added during the --

25 MR. HAMELINE: -- the office action with the patent

1 office?

2 THE COURT: Yes. Patent office. And it was done to  
3 distinguish someone else's device?

4 MR. HAMELINE: Correct, Your Honor.

5 THE COURT: All right.

6 MR. HAMELINE: If you think of -- I'll try to do  
7 this.

8 THE COURT: That, "The inner portion of the panel  
9 extending continuously between the first portion of the  
10 buoyant member and the second portion of the buoyant member  
11 without an intervening buoyant member."

12 Okay. Now, what is the problem here?

13 MR. HAMELINE: Well, the issue is whether the inner  
14 panel here that I'm holding up, this demonstrative, extends.

15 THE COURT: Is that in this patent anywhere?

16 MR. HAMELINE: This, no. I'm using it as a  
17 demonstrative to show what we are talking about.

18 THE COURT: To show what? We are not trying that  
19 case yet. And you are. But don't try the case. Let's deal  
20 with the terminology.

21 MR. HAMELINE: Sure. If you take a look at Page 50  
22 of the slide and you look at the figures from the patent.

23 THE COURT: Okay.

24 MR. HAMELINE: You will see in figure 1.

25 THE COURT: Figure 1.

1 MR. HAMELINE: Figure 1.

2 THE COURT: Shows the inner portion of the panel.

3 MR. HAMELINE: 103 extending continuously to 108 or  
4 100, whatever the other tube is, and extends continuously,  
5 and is sealed or connected to it directly and physically.

6 And that's what "extended continuously" in our position  
7 means, that it extends continuously; whereas, in figure 7A --

8 THE COURT: Figure 1 shows the inner portion of the  
9 panel extending continuously without interruption all the way  
10 to --

11 MR. HAMELINE: -- the inner tube, if you will.

12 THE COURT: To the other side.

13 MR. HAMELINE: To the other side, yes.

14 THE COURT: Each side goes to the other side?

15 MR. HAMELINE: Yep. If you look at figure 7A.

16 THE COURT: 7A.

17 MR. HAMELINE: Directly below it, you will see  
18 what's 120B, you will see there is a gap. It doesn't extend  
19 continuously.

20 THE COURT: Let's look at -- "compare figure 7A,  
21 which is an example of the inner portion of the panel not  
22 extending continuously due to the holes denoted by 120A and  
23 120B." Holes. Do the holes stop anything?

24 MR. HAMELINE: I'm sorry, Your Honor?

25 THE COURT: Does the hole stop anything?



1           MR. HAMELINE: It doesn't extend continuously, so,  
2           yes.

3           THE COURT: It doesn't?

4           MR. HAMELINE: It does stop because it doesn't  
5           extend continuously. So the hole stops the inner mesh from  
6           going --

7           THE COURT: So it doesn't go around in the area like  
8           figure 1?

9           MR. HAMELINE: Correct, Your Honor.

10          THE COURT: Does not. All right. Let me hear from  
11          Mr. Brady. It's an interesting point.

12          Mr. Brady, Mr. Hameline says that this doesn't  
13          extend continuously because figure 7A shows a hole, and I  
14          assume that this inflatable ring does not go around like it's  
15          shown in figure 1; is that correct?

16          MR. BRADY: I think that is consistent with the  
17          specifications description of figure 7A, that there are holes  
18          on the side of that mesh panel. You could theoretically put  
19          your hands through and touch water. But can we start with  
20          the claim language because this is -- we should always start  
21          with the claim language.

22          Aqua-Leisure is reading the claim as requiring the  
23          material to extend completely from one portion to the other  
24          portion. That is not what the claim limitation says. It  
25          says it's extending continuously between the first portion

1 and the second portion. So if you bear with me, I'll try  
2 some background for why that distinction is very critical  
3 here. We can construe this element without excluding any  
4 embodiments in the specification. During the prosecution --

5 THE COURT: Stop a minute.

6 MR. BRADY: Yes, sir.

7 THE COURT: I'm trying to figure out if this, so to  
8 speak, seat is over top of the buoyant ring in figure 7A or  
9 not? I don't know.

10 MR. BRADY: Which portion, Your Honor? Which  
11 reference numeral?

12 THE COURT: In figure 1, okay, figure 1, then you  
13 take figure 7A. In figure 1 the seat stops, okay. You come  
14 down from the neck, which is the best way of describing it,  
15 down what would be the back and then where one would have  
16 your bottom of the seat, and it seems to either attach to the  
17 sides of the -- what do we call this ring? The buoyant ring?

18 MR. BRADY: Uh-huh.

19 THE COURT: What I'm asking, in 7A, does the seat,  
20 this extra seat, go on top of the buoyant member?

21 MR. BRADY: So the specific embodiment shown in  
22 figure A, my recollection from the specification, is that  
23 that seat portion 302, it rides from the back and down to  
24 where you would sit, the seat portion, and then here it looks  
25 like it connects over support member 306. But the

1 specification, in describing this figure, it also teaches  
2 that the seat portion can attach in other places to the back  
3 support member and to the buoyant member. So there is a lot  
4 of scope of disclosure that's not represented in this figure.

5 THE COURT: Well, tell me what that is.

6 MR. BRADY: Sure. Bear with me, Your Honor. I have  
7 a slide addressing this point, but I think it comes up in the  
8 context of another limitation, the point being that the claim  
9 should not be limited to the embodiment of figure 7A. One of  
10 the reasons being that there are numerous statements about  
11 where that mesh or that seat portion can connect. That's  
12 what I'm looking for right now.

13 As I recall from memory, that the discussion of that  
14 in the specification is connected to figure 7A and 7B. Okay.  
15 So advancing to my slide number 30, this is an excerpt of the  
16 patent.

17 THE COURT: All right. Stop. You are in the patent  
18 now. What page?

19 MR. BRADY: Is it on your screen, Your Honor?

20 THE COURT: It's on the screen. Go ahead.

21 MR. BRADY: So this is just one excerpt, and it's in  
22 the portion discussing figure 7A. Column 8, beginning at  
23 line 65, so that's towards the bottom, and it says the  
24 membrane can be attached to the back portion 310 along with  
25 any part of the back portion. So even though figure 7A shows

1 it attaching to the top, could attach it anywhere else.  
2 Likewise, it could be coupled to the back portion and the  
3 seat portion proximate to the back portion. So it can attach  
4 in places other than as shown in Figure 7A. But I think we  
5 might be straying a bit from the issues relating to the  
6 extending continuously limitation.

7 As you noted, this was added during prosecution. It  
8 was added to distinguish the Peterson reference. I have  
9 shown on the slide 20 -- that should be on the screen now --  
10 I've got figure 1 from Peterson, and it shows a two-person  
11 seat with a buoyant member right in the middle. In response  
12 to an office action, the applicant added this extending  
13 continuously limitation to distinguish this specific  
14 reference.

15 Now, as I started out with this portion, I noted  
16 that Aqua-Leisure's construction reads this limitation as if  
17 it said extends continuously from one place to another.  
18 That's how it said. It says extending continuously between  
19 two locations without an intervening buoyant member.

20 So figure 7A, which is now on the screen, that seat  
21 portion 302 extends continuously without an intervening  
22 buoyant member, even though these holes that I've indicated  
23 in red on the slide, they're there, and it does not extend  
24 from one side to the next. It extends continuously.

25 THE COURT: Thank you, Mr. Brady.

1           Next one we have is --

2           MR. HAMELINE: The next term we have, Your Honor, is  
3 "buoyant member disposed within at least a portion of the  
4 outer portion of the panel." That's on Page 53 of our  
5 package. Here, Your Honor, it's sort of like having to prove  
6 the negative, and I've been waiting for plaintiffs to come up  
7 with some gap-filler here anywhere to explain to us what is  
8 the outer portion of the panel in this claim language.

9           THE COURT: The words we are trying to determine now  
10 is disposed?

11           MR. HAMELINE: It's buoyant member dis -- so we have  
12 the buoyant member, which is the inner tube, and it's  
13 "disposed" -- and this is what we are really getting at --  
14 "within at least a portion of the outer portion of the  
15 panel."

16           THE COURT: "Buoyant member disposed within at least  
17 a portion of the outer portion of the panel."

18           MR. HAMELINE: If you will, Your Honor, I'd refer  
19 back to Page 24 of our PowerPoint which goes back to figure 1  
20 of the patent.

21           THE COURT: How do we get a spring in there?

22           MR. HAMELINE: Because there is nothing -- because  
23 the spring is disclosed in basically every line in the patent  
24 specification, and it's in every figure. When they claim a  
25 buoyant member disposed within at least a portion of the

1 outer portion of the panel, we have to answer the question,  
2 what's the outer portion of the panel? What is outside of  
3 the buoyant member? And the only thing we have --

4 THE COURT: The only thing outside, you're saying,  
5 is the spring?

6 MR. HAMELINE: Is the spring. And I'm waiting for  
7 them to come up with some --

8 THE COURT: Well, we will hear from Mr. Brady.

9 MR. HAMELINE: Your Honor, we did bring in one of  
10 the spring floats with a spring if you want to see what a  
11 spring is.

12 THE COURT: You want to use their --

13 MR. HAMELINE: You asked what a spring was, so we  
14 brought a spring.

15 THE COURT: Has that got a spring on it?

16 MR. HAMELINE: This is their product that has a  
17 spring on it.

18 THE COURT: Their product. That's wonderful. So  
19 right now I know what a spring is, by now is metal?

20 MR. HAMELINE: Yes. Typically metal, yes, Your  
21 Honor.

22 THE COURT: Okay. Mr. Brady, let's see if we can't  
23 get to this "buoyant member disclosed within at least a  
24 portion of the outer portion of the panel." This one has me  
25 stymied, Mr. Brady.

1 MR. BRADY: Go right to the specification where it  
2 uses that same phrase.

3 THE COURT: Okay. Let's go to the --

4 MR. BRADY: So on the screen I have, in the bottom  
5 left corner of the slide, this is from the '540 patent.

6 THE COURT: What number, and so that I can refer to  
7 it?

8 MR. BRADY: This is slide number 23.

9 THE COURT: Not the slide number.

10 MR. BRADY: The '540 patent, beginning at column 5,  
11 line 50.

12 THE COURT: '540 patent, column 5, lines --

13 MR. BRADY: Lines 50 through 56.

14 THE COURT: Okay. Now, let's see what it says here.  
15 Okay. Go ahead.

16 MR. BRADY: Okay. So this slide, I think, is --  
17 will hopefully provide the context for this claim element.

18 We know from the specification that the "outer  
19 portion of the panel includes the panel's perimeter as well  
20 as some portion within the perimeter." That is a quote from  
21 the specification. We also know from the specification that  
22 "the outer portion of the panel can include one or more  
23 buoyant members, for example, an inflatable bladder." We  
24 also know from, actually the excerpt that's reproduced at the  
25 bottom left, that the inflatable bladder can be contained

1 within the outer portion.

2 So with those teachings we know that the outer  
3 portion of the panel can be, for example, that cylindrical  
4 shell inside of which you have an inflatable bladder. The  
5 inflatable bladder in figure 1 is disposed about at least a  
6 part of the outer portion of the panel.

7 THE COURT: An inflatable bladder is disposed about  
8 at least a part of the outer portion of the panel. Tell me,  
9 what does that mean?

10 MR. BRADY: It is confusing language. I will agree  
11 with you that it is awkwardly worded, but what I think it  
12 means is that if we define an outer portion of a panel as  
13 it's a portion, more than just an outer perimeter, so it has  
14 depth into the middle of the float.

15 THE COURT: So what you're indicating is since it's  
16 the outer portion, what Mr. Hameline has said is the only  
17 outer portion is the spring?

18 MR. BRADY: Well, the spring 104 shown in figure 1  
19 is, to me, shown as outside of that outer portion of the  
20 panel 102. I reference 102. That's what the specification  
21 identified as the outer portion of the panel.

22 THE COURT: What you're saying is the outer portion  
23 of the panel does not necessarily eliminate everything except  
24 the spring?

25 MR. BRADY: I believe that's correct. That's



1 straight from the specification. So figure 1 is described  
2 as, in terms of the limitation that we are trying to  
3 understand, figure 1 shows the limitation that's up for  
4 construction. And it shows inflatable bladder 108 being  
5 disposed about at least a portion or a part of reference  
6 102 --

7 THE COURT: Figure 1 shows what now?

8 MR. BRADY: So figure 1, we have the inflatable  
9 bladder, which is within the outer portion of the panel,  
10 which is reference 102. So the buoyant member inside of it  
11 is an inflatable bladder. I think what that means is there  
12 is an inner perimeter of that buoyant member, and the  
13 specification is including that inner perimeter as part of  
14 the outer portion. If I may borrow one of the  
15 demonstratives.

16 THE COURT: The red part that says "at a portion of  
17 the panel," is what you added; is that correct?

18 MR. BRADY: Yes, Your Honor, that's correct.

19 THE COURT: The other is what was in the  
20 specification itself; correct?

21 MR. BRADY: Yes.

22 THE COURT: So "the inflatable bladder" is what  
23 you've added in red; is that correct?

24 MR. BRADY: I've inserted the words to identify what  
25 reference numeral 108 is.

1 THE COURT: Okay. Where did you get the definition  
2 "at a portion of the panel" for this?

3 MR. BRADY: It appears in numerous instances, but it  
4 is -- one instance is produced to the left of that figure.

5 THE COURT: 101.

6 MR. BRADY: As I'm looking at it, outer portion 101  
7 of the panel 102.

8 THE COURT: All right. Now, was there any  
9 definition of 101?

10 MR. BRADY: Yes. That is described as the outer  
11 portion of the panel.

12 THE COURT: It is described?

13 MR. BRADY: In the specification.

14 THE COURT: 101?

15 MR. BRADY: Unless I'm getting my numbers backwards.  
16 Yes. This is an image from the specification.

17 THE COURT: Well, it says being continued within the  
18 outer portion, 101 of the panel.

19 Thank you very much.

20 MR. HAMELINE: Your Honor, may I respond just two  
21 quick sentences on that?

22 THE COURT: No. I'm not going to start that. We  
23 would be here till next week if I did that. Can't do that.

24 Okay. What's the next one we are on?

25 MR. HAMELINE: The next one is "mesh material

1 disposed at least between the back support portion" --

2 THE COURT: "Being disposed at least between the  
3 back support portion and a support portion defined by the  
4 panel."

5 MR. HAMELINE: Correct.

6 THE COURT: Yours says plain and ordinary meaning,  
7 which is not limited to one piece of mesh where the mesh  
8 connects to the apparatus or forming a hammock-like spring.

9 MR. HAMELINE: So SwimWays is taking, once again,  
10 plain and ordinary meaning.

11 THE COURT: Both of you are rewriting the  
12 specification.

13 MR. HAMELINE: Well, that's what -- if we used the  
14 exact same language, people would say you're not giving us  
15 the meaning. We are trying to give you the meaning by  
16 quoting from the specification.

17 THE COURT: Okay. I don't have much problem with  
18 mesh material being disposed at least between the back  
19 support portion and the support portion defined by the panel.  
20 So why is there a problem?

21 MR. HAMELINE: Well, I just look at figure 7A, which  
22 is on Page 58, and that's what we understand is the  
23 disclosure here. Again, in the interest of time, I'd just  
24 rely on our briefs.

25 THE COURT: One piece of mesh where the mesh

1 connects to the apparatus, all of that, I didn't see that in  
2 the claim.

3 MR. HAMELINE: Well, that's why you look at the  
4 specification of the figures to understand what's in the  
5 claim. Thank you, Your Honor.

6 THE COURT: Trying to stick to the wording that I'm  
7 trying to interpret rather than now interpreting  
8 specifications. I'll interpret these specifications so we  
9 can get to the trial, depending on the meaning of the words,  
10 you know.

11 MR. HAMELINE: Well, I just step back again.

12 THE COURT: The problem is we can't constantly  
13 rewrite all the words. I'm not about to do that.

14 MR. HAMELINE: I'm not disputing this, Your Honor.  
15 All I'm saying is the purpose of the *Markman* hearing is to  
16 give an interpretation of the words that's consistent with  
17 the specification. I've heard your comment on this one, and  
18 we will move on to the next one. Thank you.

19 THE COURT: Okay. What have you got to say,  
20 Mr. Brady?

21 MR. BRADY: I think the plain language of this  
22 element speaks for itself. "Mesh material disposed," that  
23 means between the two items. It is what it is. Figure 7A  
24 would exclude other figures which show a mesh material  
25 between these two portions. Thank you.

1 MR. HAMELINE: Your Honor, the next is "support  
2 portion."

3 THE COURT: Hold it. The next one.

4 MR. HAMELINE: The next term is "support portion,"  
5 Your Honor, and that's on Page 59 of our presentation, and  
6 "support portion," our proposed construction is a spring --

7 THE COURT: Just a minute, Mr. Hameline.

8 MR. HAMELINE: Yes. Thank you, Your Honor.

9 THE COURT: This is claim 23, right?

10 MR. HAMELINE: Correct.

11 THE COURT: Okay. A support portion. You got five  
12 minutes.

13 MR. HAMELINE: Yes. Your Honor, if you go to Page  
14 61 of our brief, we quote directly from the specification of  
15 the '540 patent at column 3, lines 33 to 40.

16 THE COURT: 65 of this?

17 MR. HAMELINE: 61.

18 THE COURT: 61. Okay. Page 61. Go ahead.

19 MR. HAMELINE: Once again, for context, Your Honor,  
20 we are trying to distinguish between what the patent, the  
21 patentee, and his lawyer described as the support portion and  
22 distinguishing it, because it must have some meaning over and  
23 above or different from back support portion, the buoyant  
24 member, the foot support member, and here the support  
25 portion. These are terms used in the patent. These are

1 terms used by very sophisticated patent lawyers. We assume  
2 they have specific meaning. And they are defined in the '540  
3 patent at column 3, lines 33 to 40, as you will see in the  
4 quote, it says, "In accordance with some embodiments of the  
5 invention, the outer portion of the panel can include one or  
6 more buoyant members (e.g., an inflatable bladder), one or  
7 more support members (e.g., a spring, rigid support member,  
8 or semi-rigid member)..."

9 So that is where we take this directly from the  
10 meaning of the patent. I assume their argument is going to  
11 be what we are saying here in accordance with some  
12 embodiments of the invention, but we have to give some  
13 meaning here. We can't just say, well, there must be some  
14 other embodiment and it can mean anything.

15 What we are trying to do is ascribe some meaning to  
16 the terms that they use in their patents so people can  
17 understand the scope of their invention.

18 Thank you, Your Honor, unless you have other  
19 questions.

20 THE COURT: So you maintain that the support portion  
21 is not limited to a spring, rigid support or semi-rigid  
22 support or a separate inflatable bladder; correct?

23 MR. HAMELINE: Well, I submit that it is limited to  
24 what's listed, quoted right here.

25 THE COURT: You say that's what it is?

1 MR. HAMELINE: That's what it is, yes.

2 THE COURT: All right. Let me hear Mr. Brady,  
3 Mr. Hameline.

4 Mr. Brady, he is saying that a support portion is  
5 not limited to a spring, rigid support or a semi-rigid  
6 support or a separate inflatable bladder, that whatever it is  
7 that supports it could support it.

8 MR. BRADY: Correct. If we look at the entire  
9 claim, I have it on the screen right now, but this is the  
10 pertinent portion. We are talking about a support portion  
11 defined by the panel. In the specification we have the  
12 unfortunate challenge of dealing with disclosure relating to  
13 a support member such as a --

14 THE COURT: All right. The support member is  
15 defined by the panel?

16 MR. BRADY: Yes.

17 THE COURT: Well, where is it defined?

18 MR. BRADY: We look at figure 1, for example. We  
19 have what the specification describes as support member 106.  
20 That is a support member defined by the panel 102. When the  
21 specification talks about a rigid support member, such as a  
22 spring, it talks about it in the context of reference numeral  
23 104 of rigid support member.

24 I believe that Aqua-Leisure is mistaking the rigid  
25 support member, such as a spring, for the support member

1 defined by the panel, such as reference numeral 106.

2 THE COURT: So go over that now. What you are  
3 saying is that 106 is a support member; is that right?

4 MR. BRADY: Yes, sir. There is a disclosure in the  
5 specification about support member 106 being integral with  
6 other portions or it can be separable or attached, things of  
7 that nature. So when the claim is to a support member  
8 defined by the panel, that's what the patentee's identifying,  
9 not a rigid support member, a spring, which is not even  
10 defined by the panel. It circumnavigates in figure 1. I  
11 switched the slide, but I can put it back.

12 THE COURT: Said rigid support member or a  
13 shape-retaining member, for example, a collapsible spring.

14 Why do you say it's limited to a spring?

15 MR. BRADY: Oh, I don't. I'm not saying it is.  
16 Plaintiffs' position is that this should be given its  
17 ordinary meaning, which is a support portion defined by the  
18 panel. Mr. Hameline is saying that it should include a  
19 spring, rigid support or semi-rigid support; whereas,  
20 separate inflatable bladder. So they either reference it to  
21 a spring or a rigid support or a semi-rigid support, are  
22 mistaken because those elements get to the rigid support  
23 member, which is reference numeral 104.

24 THE COURT: A support portion is a portion of  
25 something that supports.



1 MR. BRADY: I'd agree. Plain and ordinary meaning,  
2 that's correct. This must be defined by the panel.

3 THE COURT: Thank you. How many have you had,  
4 Mr. Hameline?

5 MR. HAMELINE: I'm not keeping count. This is my  
6 last one, and then we are moving to another patent. We have  
7 three Mr. Brady is going to do, if you want to switch back.

8 THE COURT: I just don't want to be taking sides,  
9 that's all.

10 MR. HAMELINE: We can switch at this one or finish  
11 with this.

12 THE COURT: Go ahead, Mr. Hameline.

13 MR. HAMELINE: All right. I apologize if I have  
14 done more than my fair share. Page 63 of our slide deck.  
15 This is a term in the '640 patent. The phrase is -- or the  
16 phrase is, "The user's back is collectively supported by the  
17 back portion of the mesh membrane."

18 THE COURT: Slow down a minute. Let me get back to  
19 my notes here. Here we are. Somehow or another I got behind  
20 here. Let me make sure. It was the seated position but  
21 you're not on seated position. Let me go back. I've got to  
22 go back.

23 MR. HAMELINE: Your Honor, the seated position one  
24 we've already dealt with earlier today; is that right? So we  
25 don't have to revisit. I know that was in the list.

1 THE COURT: Okay.

2 MR. HAMELINE: So we would move to what's on Page 63  
3 of my deck, which is "the user's back is collectively  
4 supported by the back portion of the mesh membrane."

5 THE COURT: Excuse me. So what are you on now,  
6 Mr. Hameline?

7 MR. HAMELINE: Yes, Your Honor. If you turn to Page  
8 65, you can see the figure. Here, once again, a picture is  
9 much easier than trying to describe what's in words, but we  
10 do have in words here, shows how in figure 7A.

11 THE COURT: 65. Let me get to 65.

12 MR. HAMELINE: 65. Here in figure 7A.

13 THE COURT: All right. In 7A.

14 MR. HAMELINE: We can see, once again, how the mesh  
15 membrane or the membrane that runs, that is labeled as 302,  
16 is configured to collectively support the back portion of the  
17 mesh membrane or the user's back is collectively supported by  
18 the back portion of the mesh membrane that's on top of 302  
19 that runs up to 309, and the back support portion of the  
20 inflatable member is 310.

21 THE COURT: "User's back is collectively supported  
22 by the back portion of the mesh membrane and the back support  
23 portion of the inflatable member."

24 MR. HAMELINE: Correct.

25 THE COURT: So what you're claiming is the back

1 support portion and the back portion are indefinite?

2 MR. HAMELINE: Indefinite, or this figure 7A gives  
3 some meaning to the terms, and it is that sling that runs and  
4 collectively supports the mesh membrane running up over the  
5 back support. Because, otherwise, it's very difficult to  
6 understand where in the patent it is described how this  
7 collectively supports the user's back.

8 So if a mesh membrane is just sewed on to -- a piece  
9 of it is just sewed onto the back portion, it doesn't support  
10 anything. It just covers it. This shows the one place in  
11 the patent where it could collectively -- where the user's  
12 back could be collectively supported.

13 THE COURT: Okay. Let me hear from Mr. Brady.

14 Mr. Brady, you are saying that the mesh membrane  
15 doesn't do anything?

16 MR. BRADY: I think that would be incorrect but  
17 should start with the plain language of the claim.

18 THE COURT: The claim says, "The user's back is  
19 collectively supported by the back portion of the mesh  
20 membrane and the back support portion of the inflatable  
21 member."

22 MR. BRADY: That's correct, and I have the '640  
23 patent claim on the screen.

24 THE COURT: I don't have any problem knowing what  
25 the inflatable member is. I'm having some problems in regard

1 to what is the back portion of the mesh membrane.

2 MR. BRADY: So if we look above, earlier in the  
3 claim, and I have it on the screen, and it's underlined,  
4 earlier it recites a mesh membrane, including a seat portion.

5 THE COURT: Including a seat portion and a back  
6 portion.

7 MR. BRADY: So now we have defined in the claim the  
8 piece of mesh with the seat portion and the back portion.

9 THE COURT: Just a minute. All right. I see the  
10 entire '640 patent, claim number 1, apparatus. (Reading).  
11 Go ahead. One thing you don't have here is the numbers on  
12 this thing.

13 MR. BRADY: Numbers of what?

14 THE COURT: Line numbers.

15 MR. BRADY: No, I dropped those off. I apologize.  
16 I could grab the copy of the patent and read them, if that  
17 would help.

18 THE COURT: Go ahead.

19 MR. BRADY: So this claim does not say anything  
20 about a hammock-like sling, which is how Aqua-Leisure would  
21 like to construe this. In fact, the word "sling" does not  
22 appear in the specification. I'm not entirely sure I know  
23 what that means. Aqua-Leisure started its construction  
24 argument by beginning with figure 7A, and they're improperly  
25 limiting this claim to only figure 7A, but that's not

1 necessary.

2 THE COURT: What figures besides 7A are involved?

3 MR. BRADY: I think this claim can cover any  
4 embodiment, provided that the mesh material in that  
5 embodiment has a seat portion and a back portion, and that  
6 mesh back portion supports the user's back. So I pointed to  
7 this portion of the specification earlier. It teaches that  
8 we can modify where the mesh material or the membrane  
9 connects to the back portion. You can move it higher; you  
10 can move it lower, depends on where the user wants to put it.

11 THE COURT: Let's go back to the --

12 MR. BRADY: To the constructions or to the claim?

13 THE COURT: '640 patent, claim 1.

14 MR. BRADY: That's on the screen now.

15 THE COURT: Okay.

16 MR. BRADY: Should be in the '640 patent in column  
17 14.

18 THE COURT: Yeah, I've got it. Lines --

19 MR. BRADY: 40'ish.

20 THE COURT: -- 40 through 60. Okay. How can a  
21 portion of this claim aid me in determining what the first  
22 portion means, is what I was having some problems with it.

23 Okay. Go ahead, Mr. Brady. You got two minutes to  
24 say anything you want.

25 MR. BRADY: Plain and ordinary meaning should

1 govern. There is nothing special or difficult to understand  
2 about this claim element. Aqua-Leisure wants it to require  
3 the same piece of mesh membrane as in one piece. As a matter  
4 of law, that's incorrect, and they want it to include a  
5 hammock-like swing, which, as a matter of law, should be  
6 incorrect. That would exclude figure 1A, for example.

7 But the specification teaches, at least at column 8  
8 starting around line 65, that the membrane can be coupled to  
9 the back portion wherever these are ones. There is other  
10 parts to the patent that teach you can use those features in  
11 other embodiments. I think the takeaway to one of ordinary  
12 skill, if we want the mesh to cover half of the back portion  
13 or the back -- whatever the term is -- then they can make it  
14 that way. So in view of the specification, I think  
15 Aqua-Leisure's proposed construction is incorrect.

16 Your Honor, I see that you are looking at Exhibit A  
17 to the parties' joint claim construction statement. I should  
18 point out that we briefed some of these terms that appear in  
19 the '540 and the '640 patent together. So we've already  
20 addressed a lot, and now I think that brings us to the '888  
21 patent. Those are the only terms remaining. We are almost  
22 there.

23 THE COURT: Okay.

24 MR. ALBERT: Your Honor, we are going to change.

25 THE COURT: I'm glad to hear from you, Mr. Albert.

1 MR. ALBERT: I have been unusually quiet today, Your  
2 Honor.

3 THE COURT: You really have.

4 MR. ALBERT: I know, but you've had plenty of fun  
5 without me, so I didn't want to stop you while you were on a  
6 roll, Your Honor.

7 THE COURT: But everybody says you bring a little  
8 pleasantness to our otherwise unpleasant situation.

9 MR. ALBERT: I think that's a compliment, Your  
10 Honor. I'm going to take it that way. I know it was  
11 intended that way.

12 Rich Maidman is going to address the '888 patent, if  
13 the Court please, and you may recall that's how we divided it  
14 up on this side. We won't have two people arguing, but we  
15 just divided it up half.

16 THE COURT: I don't mind dividing it up. What are  
17 you going to do?

18 MR. ALBERT: I'm just a hood ornament today, Your  
19 Honor.

20 THE COURT: You just came to bring some goodwill.

21 MR. ALBERT: I'm the hood ornament. I'm just  
22 spreading calm in the room.

23 THE COURT: That's very good.

24 MR. ALBERT: It's been a very calm morning. I mean,  
25 nothing has been thrown. We've done all right, I think.

1 THE COURT: '888 patent. Get to that.

2 MR. MAIDMAN: So, Your Honor, I think the next term  
3 on the list was apparatus, but I believe Mr. Hameline  
4 addressed that earlier this morning.

5 THE COURT: I think we pretty well covered  
6 apparatus.

7 MR. MAIDMAN: Yes. Agreed.

8 THE COURT: But that's not to stop you from adding  
9 something if you like. I don't want you not to have an  
10 opportunity if you want to add something.

11 MR. MAIDMAN: I think it was pretty well covered, so  
12 we will go with "a second flexible material defining an  
13 inflatable chamber." So that's on Page 67 of the packet that  
14 we handed out. So Aqua-Leisure's proposed construction here,  
15 and this appears in claim 15 of the '888 patent, is that the  
16 second flexible material defining an inflatable chamber is  
17 airtight material which forms the bladder for the inflatable  
18 chamber in the device.

19 If you go to claim 15 of the '888 patent, part of  
20 that claim specifies, "A valve coupled to the second flexible  
21 material, the valve configured to communicate air to the  
22 inflatable chamber of the second flexible material." Now, if  
23 the inflatable chamber is made of the second flexible  
24 material, necessarily the second flexible material must be  
25 airtight, and that's why there is a valve that's coupled to



1 it under the claim.

2 THE COURT: Let me stop you there. Go right to  
3 that's "An apparatus, comprising: A first flexible material  
4 having an outer perimeter portion; a second flexible material  
5 defining an inflatable chamber and an inner perimeter  
6 portion; the inner perimeter portion of the second flexible  
7 material being fixedly coupled to the outer perimeter portion  
8 of the first flexible material."

9 Okay.

10 MR. MAIDMAN: So the portion that I was just reading  
11 and was focused on is in column 6, line 6 of the patent. So  
12 still claim 15, where it reads, "A valve coupled to the  
13 second flexible material, the valve configured" --

14 THE COURT: Stop a minute.

15 MR. MAIDMAN: Sure.

16 THE COURT: I'm lost at where you're reading now.  
17 Where are you?

18 MR. MAIDMAN: So column 6 at line 6.

19 THE COURT: Line 6.

20 MR. MAIDMAN: Of the '888 patent.

21 THE COURT: Talks about a valve coupled to the  
22 second flexible material?

23 MR. MAIDMAN: Exactly. Right. So the valve  
24 configured to communicate air to the inflatable chamber of  
25 the second flexible material. So the second flexible

1 material has to be airtight or else it can't hold any air,  
2 and that's why you have a valve attached to it so that you  
3 could pump it up.

4 I'd also add that the second flexible material must  
5 be airtight because it has to define the inflatable chamber.  
6 So if you picture a balloon, you blow the balloon up. The  
7 inflatable chamber in the balloon is going to be the shape of  
8 the outer part of the balloon. Now, you can decorate the  
9 balloon any way you want, but the shape of the balloon is  
10 going to define the inflatable chamber.

11 THE COURT: So you maintain, then, that it doesn't  
12 have to be an airtight material?

13 MR. MAIDMAN: No. We say it does have to be an  
14 airtight material or else the claim wouldn't work.

15 THE COURT: They are saying it's not limited to an  
16 airtight material?

17 MR. MAIDMAN: Right.

18 THE COURT: You're saying it couldn't have a valve  
19 on something if it weren't airtight?

20 MR. MAIDMAN: Exactly. That's kind of the theme  
21 that will come out in some of the other claims as well.

22 THE COURT: Okay. All right, Mr. Brady. You are  
23 saying you got a valve here, has to be an airtight material,  
24 and evidently the oddity is you agree it's got to be an  
25 airtight material; don't you?

1 MR. BRADY: No, Your Honor. That would be  
2 inconsistent with the specification.

3 THE COURT: Why?

4 MR. BRADY: Because -- let's start with the claim  
5 language first. So this is the '888 patent, is different  
6 from the '640 and the '540. We are now in the Arias family  
7 of the patent. The claim language is a second flexible  
8 material defining an inflatable chamber, and that's a  
9 little --

10 THE COURT: Slow down a minute. Where are we now?  
11 When you say the -- what line are we on? What claim are we  
12 in, like chapter and verse?

13 MR. BRADY: We are discussing claim 15, which in the  
14 '888 patent begins in column 5, line 45.

15 THE COURT: Line 45 begins it. An apparatus  
16 comprising these things. All right.

17 MR. BRADY: That's correct.

18 THE COURT: "First flexible material having on outer  
19 perimeter portion; a second flexible material defining an  
20 inflatable chamber and an inner perimeter portion, the inner  
21 perimeter portion of the second flexible material being  
22 fixedly coupled to the outer perimeter portion of the first  
23 flexible material; an inflatable pillow coupled to at least  
24 one of the first flexible material or the second flexible  
25 material, at least a portion of the perimeter portion of the

1     inflatable pillow and the second flexible material  
2     collectively defining an interior region."

3             Now, it says, "A valve coupled to the second  
4     flexible material, the valve configured to communicate air to  
5     the inflatable chamber of the second flexible material."

6             MR. BRADY: Yes, it does.

7             THE COURT: So you say the second flexible material  
8     doesn't have to be airtight?

9             MR. BRADY: No. And if we look at the disclosed  
10    embodiments, I can explain why it does not have to be  
11    airtight as claimed.

12            Figure 2, for example, describes -- and I have it on  
13    the screen. It is awfully hard to read -- item 14 is the  
14    central portion of the flexible panel or it's the first  
15    flexible material in the claim.

16            THE COURT: Where are we now?

17            MR. BRADY: I'm looking at figure 2. It's on my  
18    slide, 32, I just --

19            THE COURT: Where am I in the patent?

20            MR. BRADY: Figure 2. This is --

21            THE COURT: '888.

22            MR. BRADY: -- '888 patent, figure 2.

23            THE COURT: I have figure 2. Okay. I don't have  
24    the -- and you're back on claim 1 or the claim under  
25    apparatus at number 15?

1 MR. BRADY: That's correct. We are talking about  
2 claim 15 now.

3 THE COURT: Yes.

4 MR. BRADY: That's what recites the second flexible  
5 material defining an inflatable chamber.

6 THE COURT: Okay.

7 MR. BRADY: So let's turn to the specification, and,  
8 really, figure 2 of the specification for a little bit of  
9 context. We have reference numeral 14 is a first flexible  
10 material. That's the "C" portion or central portion of the  
11 flexible panel. It has an outer perimeter portion that  
12 connects to the two large ovals in figure 2.

13 THE COURT: All right. Figure 2. Each of them  
14 have -- they are similar only at opposite ends; correct?

15 MR. BRADY: Yes. This is a cross-section  
16 of disclosed -- you see above in figure 1. It's a  
17 cross-section along lines II. You see the II. So figure 2  
18 is looking at figure 1 but from a cross-section.

19 THE COURT: All right. Go ahead.

20 MR. BRADY: Reference numeral 14 is a first flexible  
21 material. It has an outer perimeter portion connected to  
22 reference numeral 12. The specification identifies reference  
23 numeral 12 as a perimeter pocket, but for claim 15, I'm going  
24 to say that that is the second flexible material. So claim  
25 15 requires the second flexible material to do two things:

1 It has to define an inflatable chamber, and it has to have an  
2 inner perimeter portion connected to the first flexible  
3 material.

4 All right. Looking at figure 2, reference numeral  
5 20 identifies the inflatable chamber. You will see in figure  
6 2, that inflatable chamber is a subset, it's within reference  
7 numeral 12.

8 THE COURT: Wait a minute. Inflatable chamber 20 is  
9 within 12?

10 MR. BRADY: Yes. 12 is a second flexible material  
11 that is defined inflatable chamber 20.

12 THE COURT: So 12 is not necessarily an inflatable  
13 chamber?

14 MR. HAMELINE: Correct.

15 MR. BRADY: Correct. Not as this specification has  
16 described it. I will borrow Mr. Maidman's analogy, if I may.  
17 He described the second flexible material of claim 15 as a  
18 balloon. If he's right, then claim 15 does not include this  
19 embodiment figure 2 in the patent, which is a serious problem  
20 under Federal Circuit precedent. But if you consider an  
21 inflatable chamber as a balloon, Your Honor, encapsulate that  
22 balloon in the second flexible material, just like I could  
23 borrow one of the demonstratives and demonstrate what we are  
24 talking about.

25 The second flexible material defining an inflatable

1 chamber can mean what it shows in figure 2. An inflatable  
2 chamber is inside that second flexible material. Here's how  
3 I know that interpretation is correct. Figure 2 shows second  
4 flexible material 12 as having an inner perimeter portion  
5 connected to the outer perimeter portion of reference numeral  
6 14. I have that indicated on the slide on the screen. There  
7 is a blue line identifying that point of connection.

8 Under Mr. Maidman's argument, the second flexible  
9 material would have to be reference numeral 20. He is saying  
10 that it is the inflatable chamber itself is the balloon, but  
11 in figure 2 the balloon does not have an outer perimeter  
12 portion connected to an inner perimeter portion of the  
13 middle. I just repeated that in my head. I got the  
14 perimeter portions correct.

15 THE COURT: Thank you, Mr. Brady. I think I know  
16 where you're attempting to go.

17 MR. BRADY: Is that it for me, Your Honor?

18 THE COURT: That's enough, Mr. Brady.

19 Mr. Maidman, I'll give you a minute to reply to him.

20 MR. MAIDMAN: Sorry? Oh, a minute to reply?

21 THE COURT: Yes. I'm going to allow you to reply.

22 MR. MAIDMAN: Thank you.

23 THE COURT: Because of what he's indicated in  
24 relation to figure 2 here.

25 MR. MAIDMAN: Sure. So let me just turn to figure

1 2. So, first of all, this is one embodiment in the patent,  
2 but there is a reason why the patent has so many claims,  
3 because not every claim includes every embodiment. So this  
4 is one embodiment that the inventor set out, but one thing  
5 that I didn't hear was if the inflatable chamber is inside  
6 this material, how do you inflate it? If it's encapsulated,  
7 where is the valve that's required by claim 15? You can't.  
8 That's why it has to be airtight, because the valve is  
9 attached to it. If the valve is attached to what's denoted  
10 as 12, then there is no way to inflate the apparatus.

11 THE COURT: Thank you. Mr. Brady, he's asked an  
12 interesting question.

13 MR. BRADY: May I respond?

14 THE COURT: Yes. I'm curious about it. You said  
15 that you got to have a valve.

16 MR. BRADY: Just using a demonstrative, there is an  
17 inflatable chamber inside of this material.

18 THE COURT: Yes.

19 MR. BRADY: There is a valve coupled to the material  
20 to blow air into this chamber that's on the inside, just like  
21 in Aqua-Leisure's product, and this is a very good  
22 demonstrative because you can see the inflatable chamber  
23 through the second flexible material. You can see it through  
24 the mesh.

25 There is a valve somewhere, which it's coupled in



1 this case externally and you blow air into it. Just because  
2 the valve is coupled to the second flexible material does not  
3 preclude it from being in fluid communication with an  
4 inflatable chamber.

5 THE COURT: Okay. I think I understand what each of  
6 your arguments are in this case.

7 Okay. Let's move on to the next point.

8 We are still on '888; correct?

9 MR. MAIDMAN: Yes. All the rest of the claims are  
10 '888. So this should be quick. On Page 71 of our  
11 presentation, Aqua-Leisure's, the next term is "fixedly  
12 coupled," and this term appears in claim 15 of the '888  
13 patent. Aqua-Leisure's proposed construction is that the  
14 term is indefinite, because a person of ordinary skill in the  
15 art would not know with reasonable certainty what it means.  
16 There is no definition given in the specification or the  
17 patent.

18 THE COURT: All right, Mr. Brady. Why do you say  
19 you don't have any definition?

20 MR. BRADY: I will stick with what we've argued in  
21 the brief, that it is what any ordinary skill in the art to  
22 know if it is coupled, broad concept; and fixedly coupled,  
23 the narrow concept. I've laid it out in the briefing.  
24 Unless the Court has specific questions, I'll rely on that.

25 THE COURT: Well, coupled is one thing. Fixedly

1 coupled, I don't have any problem with. Do you?

2 MR. BRADY: Not at all. The question for  
3 indefiniteness -- first of all, that requires clear and  
4 convincing evidence for a claim to be indefinite. Under  
5 *Nautilus*, Supreme Court precedent, we have to consider this  
6 from the perspective of one of ordinary skill.

7 One of ordinary skill in this art, which I don't  
8 think we have any evidence of, I'm going to argue that he or  
9 she would understand "fixedly coupled" means it's not coming  
10 apart. My wife being fixedly coupled, she's at the hip, and  
11 I can't get rid of her; or vice versa, really she can't get  
12 rid of me. Coupled, on the other hand, connotes a broader  
13 meaning, which I think we have already addressed.

14 THE COURT: Move on. Next is the word "coupled."

15 MR. MAIDMAN: Yes.

16 THE COURT: So you are saying "coupled" means  
17 fixedly coupled?

18 MR. MAIDMAN: I'm saying "coupled" means coupled,  
19 but we need to figure out what coupled means. I still don't  
20 know what "fixedly coupled" means.

21 THE COURT: I have a lot of problems with the  
22 coupled, because, you know, coupled means a lot of things,  
23 but it depends. And all of these words, when one takes them  
24 out of context, they seem to have different meanings than  
25 they have in this context in which they are placed, and

1 that's what's important. So I don't have any trouble with  
2 this word "coupled." But you're indicating that it's fixedly  
3 coupled, that is, that they are physically joined?

4 MR. MAIDMAN: So we interpret coupled as simply  
5 coupled, and --

6 THE COURT: Fixedly coupled; otherwise, there is no  
7 reason to have the word "fixedly" before "coupled," is it?

8 MR. MAIDMAN: There may be, it's just the patent and  
9 the specification don't explain what it means. I don't think  
10 SwimWays has set forth the definition either. But moving on  
11 to "coupled," which is present in claim 15 of the '888  
12 patent, our proposed --

13 THE COURT: I don't have any problem with this.  
14 Coupled does not have to be fixedly coupled or physically  
15 attached. I couldn't do that. My wife would object to it.

16 MR. MAIDMAN: So the way that --

17 THE COURT: You know she'd object to it.

18 MR. ALBERT: Your Honor, I will provide one piece of  
19 input to the hearing today. You should do whatever possible  
20 to avoid getting on the wrong side of your wife because, you  
21 know, she'll have your hide. I've been on the receiving end  
22 of that, too. So I know of which I speak.

23 THE COURT: I've pretty well made up my mind on  
24 that.

25 MR. MAIDMAN: May I just make one point?

1           THE COURT: Fully briefed. I didn't have to hear  
2 much argument on it. I'm not trying to cut you off. Let's  
3 move on to the next point, which is "first flexible material,  
4 second flexible material."

5           MR. MAIDMAN: Sure. So the basic premise of  
6 Aqua-Leisure's proposed construction is that these words have  
7 meaning, and there is a reason why the patentees included  
8 them in the claim terms. So by referring to one flexible  
9 material as a first flexible material and then a second  
10 flexible material, they have to be different, or else why  
11 would you refer to materials as a first flexible material and  
12 a second flexible material?

13           THE COURT: Well, it sounds logical. I say your  
14 argument sounds logical. However, it may be that the first  
15 flexible material was first referred to and the second  
16 flexible material may have been secondly. Let's take a look  
17 at the use of the terminology and where it's used. Then we  
18 will determine it.

19           MR. MAIDMAN: Sure. So we can look at claim 15 of  
20 the '888 patent. Actually, if you go to slide 78 of the  
21 presentation, we laid out language from the two claims.

22           THE COURT: 78?

23           MR. MAIDMAN: Yes.

24           THE COURT: It's a long book. Okay. I'm on 78.

25           MR. MAIDMAN: Okay. So 78 includes claims 15 and

1 claims 22.

2 THE COURT: "First flexible material having an outer  
3 perimeter portion; a second flexible material defining an  
4 inflatable chamber and an inner perimeter portion, the inner  
5 perimeter portion of the second flexible material being  
6 fixedly coupled to the outer perimeter portion of the first  
7 flexible material."

8 MR. MAIDMAN: Right. So here it is referring to two  
9 different flexible materials, and then in claim 22 it talks  
10 about -- on the right-hand side, it's referring to, "The  
11 apparatus of claim 15, wherein the first flexible material is  
12 substantially planar when the inflatable chamber of the  
13 second flexible material" -- that is what we were referring  
14 to before, how the second flexible material is airtight,  
15 informed the inflatable chamber, is inflated.

16 So the patentees had a choice of what claim language  
17 to use, and they used first flexible material and second  
18 flexible material.

19 THE COURT: So what you're maintaining is these are  
20 two different materials; correct?

21 MR. MAIDMAN: Correct. Correct.

22 THE COURT: All right. That's what your position  
23 is; right?

24 MR. MAIDMAN: Correct. And during prosecution of  
25 the '888 patent, an office action allowed language --

1 THE COURT: Why did it have to be different types of  
2 flexible material? All you're doing is saying there are  
3 different types, but a type may mean it's a different type of  
4 mesh. But it could be the similar mesh, it would just be one  
5 would be one place and one would be another; wouldn't it?

6 MR. MAIDMAN: Well, so I don't think that -- there  
7 is no reason to use first flexible material and second  
8 flexible material if they are both the same material.  
9 Therefore, you would just use the word "material," or you  
10 would use the word "flexible material" goes over the --

11 THE COURT: Well, certainly would have to be  
12 something, one, the first flexible material having an outer  
13 perimeter portion. Second flexible material defining an  
14 inflatable chamber and an inner perimeter portion. Let me  
15 see what Mr. Brady has to say about this.

16 He is saying that there are different types of  
17 flexible material, but there's something different. Tell me  
18 about it.

19 MR. BRADY: So as a patent attorney, I draft patent  
20 claims. When drafting patent claims, as a device to identify  
21 a different structure, we will say a first something and a  
22 second something. That's because later I want to talk about  
23 maybe the first something is on the right and the second  
24 something is on the left. Those could be the same types of  
25 material or the same somethings. I just need to talk about

1 two.

2 In this claim, claim 15, we recite a first flexible  
3 material with an outer perimeter portion and a second  
4 flexible material that has an inner perimeter portion, and  
5 they are coupled somehow. So we know that we have two  
6 different flexible materials, and they have a configuration  
7 that we are trying to claim.

8 This claim is silent on whether the first flexible  
9 material is the same or different type of material as the  
10 second flexible material, but claim 1 of the same patent is  
11 not. If I could direct the Court's attention to that claim,  
12 I think this -- I have two very good points on this. Claim  
13 1, it's in column 4, starting at line --

14 THE COURT: In column 4?

15 MR. BRADY: Yes. I want to distinguish claim 1 from  
16 claim 15. There is Federal Circuit law, Your Honor, that  
17 says it is reversible error to import a limitation from one  
18 claim into another when it's not there. Claim 1, it recites  
19 the second flexible material being different than the first  
20 flexible material. That's in claim 1. It's not in claim 15.

21 Okay. We see the same treatment in the prosecution  
22 history. During prosecution there was an office action, and  
23 the applicant responded, responded with some amendments.

24 I'm going to point to two pages from that  
25 prosecution history. On the screen right now, this is my

1 slide 38 --

2 THE COURT: "A first flexible material having an  
3 outer perimeter portion, a second flexible material having an  
4 inner perimeter portion and an outer perimeter  
5 portion...collectively defining a sleeve, the second flexible  
6 material being different than the first flexible material,  
7 the inner perimeter portion of the second flexible material  
8 being fixedly coupled, at least in part, to the outer  
9 perimeter portion of the first flexible material."

10 MR. BRADY: Yes. That is claim 1. Aqua-Leisure is  
11 trying to read the limitation, the second flexible material  
12 being different than the first flexible material, into claim  
13 15. That's what they're trying to do. Claim 15 is column 5,  
14 beginning around line 45. It doesn't say the second flexible  
15 material being different than the first flexible material.  
16 That's not a limitation in claim 15.

17 THE COURT: And what you're saying is you can't read  
18 one definition in one claim into another?

19 MR. BRADY: One limitation from one independent  
20 claim into another independent claim.

21 THE COURT: Why is it a limitation?

22 MR. BRADY: It's recited. Claim 1 has a limitation  
23 that requires the second flexible material being different  
24 than the first flexible material. That's a limitation of  
25 claim 1. It's not in claim 15. Aqua-Leisure wants it to be,



1 but there is two very good reasons -- technically three --  
2 why that is wrong.

3 THE COURT: Okay.

4 MR. BRADY: First reason, claim 15 doesn't require  
5 it. Second reason, claim 1 does. So the Federal Circuit,  
6 and I believe the case is *Rodine* -- we cited it in the  
7 brief -- it's for the proposition that you can't import that  
8 limitation into another one. There is another important one  
9 that I think is dispositive of the issue.

10 During prosecution -- I have it on the screen -- the  
11 applicant distinguished claim 1 over some prior art on two  
12 grounds: First -- and I have both grounds highlighted -- the  
13 first ground was that claim 1 recites the second flexible  
14 material being different than the first flexible material.  
15 The second has to do with a limitation, we are about to talk  
16 about, collectively defining interior region. So claim 1,  
17 the applicant said two reasons it's patentable. Turn to the  
18 applicant's argument about claim 15. The applicant only  
19 argued the collectively defining an interior region element.

20 THE COURT: In other words, what you're saying is  
21 claim 15 is distinguished from claim 1?

22 MR. BRADY: That is correct.

23 THE COURT: Okay. I understand your position.  
24 We are getting down to two more left here.

25 MR. MAIDMAN: Okay. So the next term, if you go to

1 Page 80 of Aqua-Leisure's specification.

2 THE COURT: "Collectively defining an interior  
3 region"?

4 MR. MAIDMAN: Right. So it's Page 80 of  
5 Aqua-Leisure's presentation. So under Aqua-Leisure's  
6 proposed construction, "The exterior of the pillow extends  
7 within the inner perimeter of the second material and  
8 together they define the interior region."

9 Now, if you turn to Page 81 of the presentation, you  
10 can see this language in context in claim 15.

11 THE COURT: Page 81 of yours. Okay. I've got Page  
12 81.

13 MR. MAIDMAN: Okay. So if you take a look at the  
14 last paragraph.

15 THE COURT: It says, "An inflatable pillow coupled  
16 to at least one of the first flexible -- (reading) and the  
17 second flexible material collectively defining an interior  
18 region."

19 MR. MAIDMAN: Right.

20 THE COURT: They are trying to say that the exterior  
21 of the pillow extends within the inner perimeter of the  
22 second material. Together they define the interior region.

23 MR. MAIDMAN: Right. So if you take a look at  
24 figure 1, which is reproduced on Page 82 of the presentation,  
25 you can see how the patentees illustrated this concept. So

1 this figure shows, and we put in a yellow highlight on the  
2 part of the pillow that extends within to form the interior  
3 portion and a green highlight on the second flexible material  
4 that forms the interior portion.

5 THE COURT: Green is the second flexible material;  
6 right?

7 MR. MAIDMAN: Right. In this diagram. So when --

8 THE COURT: Yellow is what?

9 MR. MAIDMAN: The yellow is the exterior of the  
10 pillow.

11 THE COURT: Is exterior.

12 MR. MAIDMAN: Is the part of the exterior of the  
13 pillow which, together with the second flexible material,  
14 forms the inner portion -- or, sorry, the interior region.

15 THE COURT: Okay. Now we've got this, just so I  
16 know what is what. Go ahead.

17 MR. MAIDMAN: Right. So when the claim uses the  
18 words "collectively defined," that means the interior region  
19 can only be defined by the part of the pillow that extends  
20 through, that intersects with the second flexible material  
21 and a second flexible material. No other material can be  
22 used to form that interior region.

23 In order for the claim language to have meaning, at  
24 least some part of the exterior of the pillow has to  
25 intersect with the second flexible material because that's

1 how you form the enclosed interior region, and that's what  
2 the patentee showed in the specification.

3 THE COURT: All right. Mr. Brady.

4 MR. MAIDMAN: I'm sorry, can I just --

5 THE COURT: In essence what he is saying is the  
6 inner perimeter must intersect to define the particular  
7 region -- excuse me.

8 MR. MAIDMAN: Sure. And just to add one little  
9 piece, if you look at the example on Page 81, let's say that  
10 pillow, which has a little orange highlight, if that was on  
11 the exterior of the device, then the pillow and the second  
12 perimeter portion -- and the second flexible material would  
13 not collectively define an interior region, just as if the  
14 pillow was --

15 THE COURT: If the pillow were outside, it wouldn't  
16 be --

17 MR. MAIDMAN: Right. Just as if it was somewhere in  
18 the middle and it wasn't ever touching the second flexible  
19 material, then the pillow and the second flexible material  
20 could not collectively define an interior region. So they  
21 must intersect.

22 THE COURT: Mr. Brady, so we've got a collectively  
23 defined an interior region. Their inner perimeters must  
24 intersect to define that region, he says; correct?

25 MR. BRADY: That's incorrect.

1 THE COURT: That's incorrect?

2 MR. BRADY: That is incorrect.

3 THE COURT: Why is it incorrect?

4 MR. BRADY: So the specification teaches that the  
5 sleeve includes an inflatable portion disposed about at least  
6 a portion of the circumference. I know that the figures in  
7 the patent don't show this, but the specification teaches  
8 effectively you can have a "U" shaped --

9 THE COURT: Where is the specification you're  
10 referring to?

11 MR. BRADY: So column 2 of the '888 patent.

12 THE COURT: Column 2 of the '888 patent.

13 MR. BRADY: Starting at line 5, thereabouts. Just  
14 one sentence.

15 THE COURT: Column 2, and what line are you on?

16 MR. BRADY: Start line 5, "The sleeve includes an  
17 inflatable portion disposed about at least a portion of the  
18 circumference."

19 THE COURT: It says here, "The spring is disposed  
20 within the sleeve. The sleeve includes an inflatable portion  
21 disposed about at least a portion of the circumference. It  
22 is therefore an object of the present invention to provide a  
23 collapsible flotation device. It's another object of the  
24 present invention to provide a collapsible flotation device  
25 which is easily collapsed and extended to full size through a

1 mechanical means."

2 MR. BRADY: I was referring only to the sentence  
3 above lines 5 to 6.

4 THE COURT: "It is yet another object of the present  
5 invention to provide a collapsible flotation device which is  
6 easily collapsed and extended to full size through the use of  
7 a spring...to provide a collapsible flotation device which  
8 requires minimal force to twist and fold into the collapsed  
9 configuration...object of the present invention to accomplish  
10 the foregoing objectives in a simple manner."

11 Okay. Nothing simple about it to me, but it may be  
12 simple to the inventor.

13 MR. BRADY: These claim elements do take some time  
14 to digest.

15 THE COURT: So you say column 2 of '888 and line 5  
16 does what?

17 MR. BRADY: It tells us that the inflatable portion  
18 does not have to go the entire circumference, and this is  
19 important because of this claim element. What I'm doing is  
20 showing why Aqua-Leisure's incorrect.

21 THE COURT: Why couldn't you just say, then, that  
22 the plain and ordinary meaning would apply?

23 MR. BRADY: I do. That is what plaintiffs do.

24 THE COURT: Oh.

25 MR. BRADY: Aqua-Leisure is the one who wants the

1 exterior of the pillow to intersect with the inner perimeter.  
2 Like many limitations we've talked about, the issue is not  
3 the meaning of the terms. The issue is whether the  
4 limitations read on the accused product. I think this one is  
5 just another example of a claim that it means what it says.

6 The problem with the proposed construction is that  
7 it would exclude potential embodiments, and I've got some  
8 example embodiments shown on slide 41, which should be on  
9 your screen. What we have done here is we have just moved  
10 the pillow.

11 THE COURT: What you said, and where? Is it in  
12 here?

13 MR. BRADY: Yes. It should also be on your screen.  
14 I'm talking about plaintiffs' presentation, slide number 41.  
15 I've included some hypothetical embodiments.

16 THE COURT: So you maintain that that construction  
17 would exclude --

18 MR. BRADY: If I move the pillow back and I have not  
19 a complete circumferential inflatable member, it is just a  
20 "U" shape, that's within the specification's teachings, but  
21 it would be excluded from Aqua-Leisure's construction. So I  
22 don't think we need to depart from the plain and ordinary  
23 meaning of this term, and certainly not the way they have  
24 proposed to do so.

25 THE COURT: All right. I understand your position.

1           Mr. Maidman, we are on "different than the shape."

2           Isn't that where we are?

3           MR. MAIDMAN: Yes. Last one. I hope the last one.

4           THE COURT: What claim number are we in on this?

5           Claim 19 of the '888?

6           MR. MAIDMAN: Yes. I think we actually may have one  
7           bonus construction for you.

8           THE COURT: Okay.

9           MR. MAIDMAN: But, anyway, let's talk about  
10          different than the shape. Our proposed construction is a  
11          quick one. We don't know what this means. It's indefinite.  
12          There are no boundaries to different than the shape. The  
13          specification doesn't talk about what this refers to. Is it  
14          surface area? Is it a donut versus a donut hole? General  
15          perimeter shape? There is no guidance, so this claim is  
16          indefinite.

17          THE COURT: Supposed to be claim 19 of the '888  
18          patent? I must have the wrong patent.

19          MR. BRADY: I have it on the screen, Your Honor.

20          THE COURT: Claim 19. (Reading). The second  
21          flexible material has an outer most perimeter defining a  
22          shape of the second flexible material in a top view when the  
23          inflatable chamber of the second flexible material is  
24          inflated, the shape of the first flexible material in the top  
25          view being different than the shape of the second flexible



1 material in the top view when the inflatable chamber of the  
2 second flexible material is inflated."

3 Is that different than the shape that you're  
4 speaking of, I assume?

5 MR. BRADY: Yes. That is the correct claim.

6 THE COURT: Okay.

7 MR. BRADY: They are challenging it as indefinite.  
8 It means what it says. So when we get to indefiniteness, we  
9 are back to their burden of proof. I respect Mr. Maidman's  
10 argument, but it's from the perspective of one of ordinary  
11 skill, and we need clear and convincing evidence. Here we  
12 have two outer perimeters defining a shape, and they are  
13 comparing the shapes. Are they the same or are they  
14 different? That's what the claim says.

15 At best we haven't had the burden of proof met to  
16 show that this is indefinite. It can't be reasonably certain  
17 about what it means. I think reading claim 19, as wordy as  
18 it is, it says what it means. We can objectively determine,  
19 when you look at the outer perimeter to get a shape, whether  
20 that shape is the same or different to another shape. There  
21 is no subjectivity required. The case law that they cited  
22 says it requires subjective determination.

23 THE COURT: Okay. Anything else you want to add,  
24 Mr. Brady? You've got one second.

25 MR. BRADY: Thank you very much for your time, Your

1 Honor.

2 THE COURT: I'll give each of you five minutes to  
3 say anything you want.

4 MR. MAIDMAN: Your Honor, plaintiffs brought up one  
5 additional proposed construction in their responsive brief  
6 that it might make sense to address.

7 THE COURT: What was it? Maybe I didn't pick it up.  
8 Okay. What is it?

9 MR. MAIDMAN: You want to start, since it's your  
10 construction?

11 I can go ahead.

12 THE COURT: What are the words?

13 MR. MAIDMAN: So we are on --

14 THE COURT: What is the claim number, claim what?

15 MR. MAIDMAN: This is in claim 18 of the '888  
16 patent.

17 THE COURT: 18. What are the words that you want to  
18 define?

19 MR. MAIDMAN: So this was plaintiffs' proposed  
20 construction, and it's "mesh material."

21 THE COURT: I thought maybe I had something on that.  
22 Maybe I missed it.

23 MR. MAIDMAN: So this wasn't on the parties' joint  
24 list.

25 THE COURT: It wasn't on the joint list?

1 MR. MAIDMAN: Right. It appears for the first time  
2 in plaintiffs' opening brief. So Aqua-Leisure responded to  
3 it in its responsive brief just in case.

4 THE COURT: Well, let's see where we are going.

5 MR. MAIDMAN: Sure.

6 THE COURT: It's "mesh material," and what does the  
7 plaintiff claim it means?

8 MR. MAIDMAN: So SwimWays' proposed construction is  
9 that a mesh material is a pattern, such as a weave, that can  
10 allow water to flow through. Our proposed construction,  
11 Aqua-Leisure's proposed construction, which is consistent  
12 with the specification of the '888 patent, is that mesh, on  
13 one hand, and nylon or polyester on the other hand, are  
14 different.

15 Now, you can turn to Page 87 of the presentation, so  
16 you can see the claim term in context in claim 18.

17 THE COURT: SwimWays says a mesh material is a  
18 pattern such as a weave that can allow water to flow through.

19 MR. MAIDMAN: So Aqua-Leisure disagrees with that  
20 construction.

21 THE COURT: Mesh and nylon and polyester are  
22 different?

23 MR. MAIDMAN: Right. So if you turn to Page 88 of  
24 the presentation, I can explain the reason behind  
25 Aqua-Leisure's position.

1           THE COURT: What is this you reported, "In a  
2 preferred embodiment, the center portion of the flexible  
3 panel is mesh to allow water to flow through while the  
4 perimeter edges are nylon or polyester."

5           MR. MAIDMAN: So that is -- I'm sorry. Where were  
6 you reading from?

7           THE COURT: Page 88.

8           MR. MAIDMAN: I'm sorry. I should back up. I think  
9 we should start with 87, which has the claim language where  
10 it appears.

11          THE COURT: Yes. It says, "...mesh material such  
12 that at least a portion of the user's body is exposed to  
13 water when the user is disposed on the apparatus, and the  
14 second flexible material is at least one of nylon material or  
15 a polyester material."

16          MR. MAIDMAN: Right. So the claim itself  
17 distinguishes between mesh material on the one hand, which is  
18 the first flexible material, and at least one of a nylon or a  
19 polyester material on the other hand, which is the second  
20 flexible material.

21          THE COURT: Didn't define the first flexible  
22 material, only defines the second flexible material; is that  
23 your point?

24          MR. MAIDMAN: Well, my point is it actually defines  
25 both flexible materials. It defines the first flexible

1 material as being formed with a mesh material, that's number  
2 one; and then number two, the second flexible material is at  
3 least one of a nylon material or polyester material. So they  
4 are different.

5 THE COURT: So you say it's not mesh?

6 MR. MAIDMAN: Right. So, yeah, mesh is not nylon or  
7 polyester. That's what the claim language is saying, because  
8 it distinguishes between mesh material on one hand --

9 THE COURT: Well, let me --

10 MR. MAIDMAN: -- and nylon and polyester on the  
11 other.

12 THE COURT: What do you contend is mesh, so I'll  
13 understand? Here we have the bottom touching water, you say.  
14 So it touches water, but you are saying that it is not mesh,  
15 it's nylon; is that right?

16 MR. MAIDMAN: No. So the first flexible material is  
17 mesh. But the second flexible material is at least one of a  
18 nylon or a polyester. So what I'm saying is that the mesh  
19 cannot be nylon or polyester because those are what the  
20 second flexible material is.

21 THE COURT: Well, let's take a look at where in here  
22 is the first flexible material and where is the second  
23 flexible material. Take a look at it with regard to the  
24 diagrams. Where is the first flexible material and where is  
25 the second flexible material?

1 MR. MAIDMAN: Sure. So if we can take a look at  
2 figure 1.

3 THE COURT: I'm looking at figure 1.

4 MR. MAIDMAN: So the first flexible material is the  
5 interior region that we were talking about in the middle.

6 THE COURT: That is mesh?

7 MR. MAIDMAN: Yes. So that's a donut hole. And  
8 then the donut, which goes on the outside, is the second  
9 flexible material.

10 THE COURT: Where?

11 MR. MAIDMAN: So that is -- so there is the oval in  
12 the middle -- well -- almost complete oval.

13 THE COURT: Figure 1, I see, 16, 14, 12, are the  
14 only numbers.

15 MR. MAIDMAN: Yes. So I believe 14 is referring to  
16 the first flexible material.

17 THE COURT: Okay. You say 14 is the first flexible  
18 material.

19 MR. MAIDMAN: Then the cylinder, cylindrical portion  
20 that goes around 14 is the second flexible material.

21 THE COURT: Where is the second flexible material?  
22 Number 12?

23 MR. MAIDMAN: So it looks like it would be 12 in  
24 this figure, just as an example.

25 THE COURT: So the second flexible material is not

1 mesh?

2 MR. MAIDMAN: Right. It has to be nylon or  
3 polyester, and then, equally, the inner portion, 14, cannot  
4 be nylon or polyester, it can only be mesh. Because the  
5 claim distinguishes --

6 THE COURT: Why can't it be nylon or polyester?

7 MR. MAIDMAN: Well, I mean, technically it could in  
8 real life, but that's how the patentees chose to define their  
9 invention.

10 THE COURT: It doesn't define the mesh material?

11 MR. MAIDMAN: Well, it distinguishes mesh material  
12 from nylon material.

13 THE COURT: The definition I saw, that's the  
14 material.

15 MR. MAIDMAN: Oh, yes, sir.

16 THE COURT: Now, the mesh material, most of the mesh  
17 might be anything.

18 MR. MAIDMAN: Well, it distinguishes between mesh on  
19 the one hand and nylon or polyester on the other, and then if  
20 you look at --

21 THE COURT: Would you say -- you know, when we were  
22 in Korea there were nylon hoses coming over all the time. So  
23 was it -- is that what that was, one of those old nylon hoses  
24 we used to order from Sears Roebuck to sell on the black  
25 market?

1           The mesh could be anything, and it's just mesh.

2           MR. MAIDMAN: But that's not how the patentees  
3 defined the words, and that's important here.

4           THE COURT: Show me where the patent defines the  
5 mesh.

6           MR. MAIDMAN: Sure. So if you look at column 3,  
7 line 6 to 9 of the patent.

8           THE COURT: All right. Column 3, line 69. Column  
9 3, line 69 of the patent.

10          MR. MAIDMAN: So it says, "In a preferred  
11 embodiment, the center portion of the flexible panel is mesh  
12 to allow water to flow through while the perimeter edges are  
13 nylon or polyester."

14          THE COURT: Well, that's what you got right here.

15          MR. MAIDMAN: Right. So what I'm saying is that  
16 there is mesh on one hand and then nylon or polyester on the  
17 other, and the mesh cannot be nylon or polyester. That's  
18 what the language says.

19          THE COURT: I'm sorry. I can't buy that. I'll be  
20 very frank. Unless a mesh is defined somewhere, what the  
21 outside -- the second flexible material has to be according  
22 to this nylon or polyester.

23          MR. MAIDMAN: Right. So the mesh is defined as not  
24 mesh or polyester.

25          THE COURT: It could be most anything. It could be



1 fiberglass.

2 MR. MAIDMAN: It could, right.

3 THE COURT: Could be anything.

4 MR. MAIDMAN: But it couldn't be nylon or polyester.

5 THE COURT: Can only be fiberglass, then?

6 MR. MAIDMAN: No, it cannot be nylon or polyester.

7 THE COURT: Could only be fiberglass? I don't know  
8 any other mesh other than fiberglass.

9 MR. MAIDMAN: It could be anything but nylon or  
10 polyester.

11 THE COURT: It says that someplace.

12 MR. MAIDMAN: It distinguishes the mesh.

13 THE COURT: I understand. It doesn't distinguish  
14 the mesh. It just defines what the second flexible material  
15 is, but I understand your argument. You say if you define  
16 one material, it means the other can't be the same; correct?

17 MR. MAIDMAN: Correct.

18 THE COURT: If you define anything, then everything  
19 else has to be different; right?

20 MR. MAIDMAN: No, but in this context, that is  
21 what's happening. And then the last point is that plaintiffs  
22 define mesh as a weave, but there is no basis for that in the  
23 specification. I mean, my suit is woven.

24 THE COURT: I don't have any problem with mesh, and  
25 neither do you, and we all know that it means something that

1 will allow air or water to pass through it.

2 MR. MAIDMAN: To flow through, right, but not as a  
3 weave because that's too broad.

4 THE COURT: Sometimes woven, sometimes it isn't  
5 woven, depends on how much one wants to pay. If you want to  
6 pay a lot, you have it woven. If you don't want to pay a  
7 lot, it isn't woven. Frankly, I'm worried about it. The  
8 mesh does not have to be -- can't be nylon or polyester. I'm  
9 afraid it can be. I'm sorry but I don't see any problem with  
10 it. It isn't defined. If you define it, that's one thing.  
11 What defines one material does not necessarily mean other  
12 material is defined the same way. I'm sorry. I'm just not  
13 going to do it.

14 MR. MAIDMAN: I think simply defining mesh as a  
15 weave is too broad because other materials are also weaved.  
16 That is my last point.

17 THE COURT: Well, thank you. I don't mean to be  
18 cutting you off. I think we've got it all, haven't we?

19 MR. BRADY: Yes, Your Honor.

20 THE COURT: I'm going to give you five minutes each  
21 side to say anything you want. You can either talk about the  
22 weather. I don't care. You got anything you want to add,  
23 Mr. Brady?

24 MR. BRADY: Your Honor, I think we have addressed  
25 all the points that plaintiffs wish to raise. Very few terms

1 require construction, and the weather is absolutely  
2 beautiful. So we appreciate time.

3 THE COURT: Maybe you can go to Virginia Beach. You  
4 know the other day I was out looking at the beach -- it was  
5 in February -- and people were out on the beach actually  
6 swimming in February. Then came March, and we had the winter  
7 follows the summer, literally the winter following the  
8 summer. We had 80 degree temperatures in February.

9 MR. BRADY: We had our peach tree bloom in February  
10 to be frozen over in March.

11 THE COURT: Thank you.

12 MR. BRADY: Thank you, Judge.

13 THE COURT: All right.

14 MR. HAMELINE: Your Honor, thank you for your time.  
15 Thank you for everyone's time. Really do appreciate your  
16 patience and your trying very hard to dig into what are not  
17 complex products but very complex language in the patent, to  
18 try to distinguish what are fairly simple ideas here. I do  
19 appreciate it.

20 THE COURT: I appreciate your arguments, and I  
21 appreciate more the memorandum first. I'm sorry I missed  
22 this question about mesh.

23 MR. HAMELINE: It came up at a late date, and it was  
24 sort of added to some of these. I appreciate your dealing  
25 with that.

1 THE COURT: Didn't have anything on it, but I don't  
2 mean to be downing everyone. I just am not going to define  
3 something that's not defined.

4 MR. HAMELINE: Understood, Your Honor. We have  
5 opinions; they have opinions. You make the decision, and  
6 that's it. It's done. Thank you very much. Appreciate your  
7 time.

8 THE COURT: Thank you very much. I really  
9 appreciate it. We will see where we go from there. Nothing  
10 else, we will recess. We are 10 minutes early.

11 (Hearing adjourned at 4:35 p.m.)

12 CERTIFICATION

13  
14 I certify that the foregoing is a correct transcript  
15 from the record of proceedings in the above-entitled matter.  
16

17  
18 X \_\_\_\_\_/s/ \_\_\_\_\_x

19 Jody A. Stewart

20 X \_\_\_\_\_4-6-2017 \_\_\_\_\_x

21 Date  
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